81-2386

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

• • • • • • • •

PHILIP DEL COSTELLO,
Petitioner

vs.

International Brotherhood of Teamsters, et. al.
Respondent

• • • • • • • •

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PARTIES APPEARING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

* * * * *

Petitioner, Philip DelCostello, was the Plaintiff before the United States District Court for the District of Maryland and Appellant before the Court of Appeals for the Fourth Circuit.

Anchor Motor Freight, Inc., was one of the Defendants in the District Court. The other Defendants were Local 557, International Brotherhood of Teamsters, and International Brotherhood of Teamsters.

On appeal before the Circuit Court, Defendant Employer and Defendant Local were Appellees.

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

PHILIP DELCOSTELLO

Petitioner

Vs.

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, ET AL.

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Philip DelCostello, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit.

QUESTIONS PRESENTED FOR REVIEW

* * * *

(1) Is the state arbitral limitations period explicated in United Parcel Service vs. Mitchell, 101 S.Ct. 1559 (1981) applicable to both the Company and the Union when a fair representation suit is filed against both of them?

(2) Should the limitations period for bringing fair representation suits be borrowed from the National Labor Relations Act rather than state statutes for vacating arbitration awards?

(3) Assume Arguendo, that federal statutes are not the appropriate limitations periods, should this Court's Decision in United Parcel Service vs. Mitchell 101 S. Ct. 1559 (1981) be given prospective or retrospective effect?

OPINIONS BELOW

* * * *

The Opinion of the United States Court of Appeals for the Fourth Circuit is unreported and unpublished. Judgment was entered on April 19, 1982.

The initial Judgment rendered in the United States District Court occurred on March 17, 1981, pursuant to an Opinion rendered by the Honorable Shirley B. Jones denying Motions for Summary Judgment. The Opinion was reported and published at 510 F.Supp 724 (1981). Subsequently, Summary Judgment was granted on Motions for Reconsideration following this Court's Decision in United Parcel Service vs. Mitchell, Supra 101 S. Ct. 1559 (1981) in an Opinion reported and published at 524 F.Supp., 721 (1981).

JURISDICTION

* * *

This Court's Jurisdiction is invoked under 28 USC § 1254(1).

STATEMENT OF THE CASE

* * * *

Petitioner was discharged by Respondent Anchor Motor Freight on June 27, 1977, for his refusal to drive a truck which Petitioner contended was unsafe. On July 19, 1977, an Arbitration hearing was held in Atlantic City, New Jersey, before the Eastern Conference Joint Automobile Transporters Conference attended by Union and Company representatives who denied Petitioner's grievance. However, Petitioner was informed by his Union representative Arthur C. Morningstar by way of a written letter on August 19, 1977, that the Arbitration Award would not become final until September 20, 1977, when the Eastern Conference Joint Automobile Transporters Conference would meet to approve the Minutes and if Petitioner wanted to submit any corrections, deletions, or additions of the Minutes of the Arbitration Award, he must do so within 30 days. Otherwise, the Award would be final as is. Petitioner, knowing that Morningstar also served on the Eastern Conference Joint Automobile Transporters Conference, complied with this request in writing on September 14, 1977, specifically outlining that excludible and fraudulent hearsay testimony which constituted the only evidence adduced by

the company was used against him. The petitioner's statement in his September 14, 1977, letter was sufficient under the Eastern Conference rules to require a re-hearing which should have been granted in September, 1977. The failure of the Union and the Company to correspond to this letter as alleged in petitioner's affidavit before the District Court impelled the District Court to conclude the Company and the Union were estopped from claiming that the arbitral limitations period ran until December, 1977.

Petitioner filed a complaint with the National Labor Relations Board against his employer which was not heard because of the pending arbitration.

Petitioner, in compliance with this Court's decision in Auto Workers vs. Hoosier Cardinal 383 U.S. 696 (1966) instituted suit some 88 days after his apparent rejection by the Business Agent on March 16, 1978. Petitioner sued Anchor Motor Freight, Inc., the International Brotherhood of Teamsters, and Local 557 of the International Brotherhood of Teamsters, contending the

employer and Local Union violated § 301 of the Labor Management Relations Act of 1947 as amended, 29 USC § 185, by violating the duty of fair representation as well as the Collective Bargaining Agreement then in force.

The Defendants moved for Summary Judgment although Local 557 and the International failed to raise limitations as affirmative defenses in their answers. The International never raised the limitations defense in its Motion for Summary Judgment and Summary Judgment was granted in its favor of March 17, 1981, on other grounds.

However, the District Court, in her Published Opinion of March 17, 1981, denied Summary Judgment based on limitations to both Defendants, holding the action was brought in a timely fashion under the Maryland Contract Statute of Limitations. After This Court's Decision in United Parcel Service vs. Mitchell, both remaining Respondents renewed their Motions for Summary Judgment on May 5, 1981. On October 27, 1981, the District Court granted the Motions for Summary Judgment holding the limitations period began to run in December, 1977, and

applied the Maryland thirty-day statute for vacating awards [a] as to both the Company and Local Union and found the action to be timebarred since it was filed in March, 1978, and not January, 1978. The Fourth Circuit in affirming in an Unpublished Opinion held:

> "We think that the District Court was correct in its conclusion, and we affirm on the basis of its Memorandum and Order."

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[a] Maryland Courts and Judicial Proceedings Article, § 3-224.

I. REASONS FOR ALLOWANCE OF THE WRIT

INTRODUCTION

* * * * *

This Court, it is submitted should resolve the substantial conflict among the Circuit[1] and District Courts[2] as to whether its Decision in United Parcel Service vs. Mitchell 101 S. Ct. 1559 (1981) and its determination concerning limitations should be applied to both Company and Union when a 301 - fair representation suit is filed against both of them.

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[1] Mitchell, Supra, is not applicable to the Union, according to the following Circuits. Flowers vs. Steelworkers Local 2026, 671 F2d 87 (Second Circuit 1982). Sear vs. Cadillac Automobile 654 F2d 4, 67 (First Circuit, 1981). Davidson vs. Roadway Express, Footnote Two, 650 F2d 902, (Seventh Circuit, 1981). Mitchell, Supra, is applicable to the Union. Badon vs. General Motors Corp. 110 LRRM 2562, (Sixth Circuit, 1982). The District Court in her Opinion of October 22, 1981, after Petitioner raised the Sear case determined the Ninth Circuit Decision in Singer vs. Flying Tiger 652 F2d 1349 (Ninth Circuit, 1981) applied Mitchell to both Company and Union. See Also - The Fourth's Circuit's Decision in this case.

[2] Mitchell, Supra, is not applicable to the Union according to the District Courts in the following cases. McFarland vs. I.B.T., 535 F.Supp. 970 (ND/TEX, 1982). Collins vs. Car Haulers 536 F.Supp. 776 (ND/ILL, 1982). Bates vs. American Tara Corp., No. C-81-768A (ND/GA 1981). Simms vs. NUF Corp. No. 81-3494 (ED/PA 1982).

Mitchell does apply to the Union in the following cases: Kennard vs. United Parcel Service 531 F.Supp. 1139 (ED/MICH, 1982). Rigby vs. Roadway Express, 109 LRRM 3252 (SD/MISS, 1981). Fedor vs. Hygrade Food Products, 533 F.Supp. (ED/PA, 1982).

The failure of this Court to resolve this conflict will continue to produce extensive forum shopping, chaos, and uncertainty which is precisely what a Statute of Limitations is designed to correct in an area of law that cries out for uniformity.

It is Petitioner's contention that Mitchell, Supra, does not apply to the Union which is in accord with the position taken by the Second Circuit in Flowers, the First Circuit in Sear, and the Seventh Circuit in Davidson, and, therefore, either the State tort statute or National Labor Relations Act is the appropriate limitations period against the Union rather than the State Arbitration Statute. In fact, the AFL-CIO, in its amicus curiae, in Mitchell, Supra, suggested the six-months statute in the National Labor Relations Act was the appropriate statute applicable to both Company and Union.

Initially, it should be emphasized that the Union was not a party before this Court in Mitchell, Supra. Justice Rehnquist in Mitchell observed there was only one issue before the Court.

"We are called upon in this case to determine

which State Statute of Limitations period should be borrowed and applied to an Employee's Action Against his Employer under 301(a) Labor Management Relations Act 29 USC § 185(a) 1976 and Hines vs. Anchor Motor Freight 424 US 554 (1976 et. seq. (101 S. Ct. 1559).

The Court in Mitchell, Supra, never made a single reference to a limitations period in a fair representation suit filed solely against a union. In Vaca vs. Sipes 386 U.S. 171, 183-187 (1967) Supra, the Court unequivocally held an employee had the absolute right to file suit against either the Employer or Union. In Smart vs. Ellis Trucking Co., 580 F2d 215 (Sixth Circuit, 1978), cert. den. 440 U.S. 958 (1979), the Sixth Circuit held as the Second Circuit in Flowers and First Circuit in Sear, all agreed that the mere fact suit was timebarred against either the Company or Union did not mean it was barred against the other party.

Accordingly, this Court should grant Certiorari to resolve the conflict among the Circuits.

II. THE NATIONAL LABOR RELATIONS ACT IS THE APPROPRIATE STATUTE OF LIMITATIONS IN ALL FAIR REPRESENTATIONS SUITS

* * * * *

It is in the national interest to grant Certiorari because of the different approaches that the Federal Circuit and District Courts have taken in cases that have been decided since the Mitchell Decision and also there is a conflict among the Circuits. In Badon vs. General Motors Corp., 110 LRRM 2562, 2565, 2566 (Sixth Circuit, 1982), in adopting the National Labor Relations Act, the Court held:

> "In summary we are left without guidance by the State of Michigan with respect to the time period within which actions to vacate Labor Arbitration Awards must be brought. We must therefore decide this Federal question on the strength of our own reasoning. That process leads us to conclude that the most appropriate Statute of Limitations under these circumstances is the six-months period in the National Labor Relations Act. 29 USC § 160(b). "

In this case, Maryland has also made its arbitral statute expressly inapplicable to labor disputes (Maryland Courts and Judicial Proceedings Article 3-206(b) but the State Arbitration Statute was nevertheless selected.

In Singer vs. Flying Tiger Freight Lines 652 F2d 1349, 1352 (Ninth Circuit, 1981), the Court held:

> "In the future as Mitchell requires when the action is commenced after an unfavorable arbitral Decision, we shall treat suits against

> a Union for breach of the duty of fair representation and against the employer for breach of contract under this type of limitations period by selecting the State Arbitration Statute."

It remains unclear whether the Ninth Circuit would apply arbitral limitations to the Union and Company where the Union failed or refused to file a grievance in a Fair Representation/301 Action. Such a divergent course is evident from the holding of the Seventh Circuit in the case of Baker vs. Amsted Industries, Inc., 656 F2d 1245, 1251, (1981) in which the Court opined in Footnote Eleven:

> "It is possible, however, that much longer limitation periods will govern 301 and breach of duty suits that do not challenge the correctness of an Arbitration Award.
>
> (e.g. Where the Union has failed to pursue a grievance to arbitration)." [3]

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[3] See Also Byrne vs. Buffalo Creek Co. 536 F.Supp. 1301, 1306-1309 (WD/NY, 1982). Mebane vs. Metal Masters Food Service, No. K-80-973 (D/MD 1982). Kaufman, Chief Judge. Lake vs. Martin Marietta (MD/FLA, April 26, 1982) (81-230)

However, numerous courts have applied Mitchell to all stages of the grievance process even where a grievance never entered the arbitral process. For example, Bigbee vs. Local 142, 530 F.Supp. 402 (ND/ILL, 1982), Fields vs. Babcock & Wilcox (18 LRRM 3150) (WD/PA, 1981), Penson vs. Chrysler Corp., 109 LRRM 3359 (ND/OHIO, 1981). Cade vs. Bethlehem Steel, Civil No. JH-80-3332 (D/MD, 1982). Ross vs. Bethlehem Steel Corp., JH-81-273 (D/MD, 1981). In fact, the Supreme Court's Decision in Mitchell, Supra, to apply the State Arbitration Statute to 301 Actions involving arbitral awards has actually been subsequently rejected by six courts which adopted the Federal Arbitration Act, National Labor Relations Act, and State Tort Statute, e.g. Badon vs. GMC, 110 LRRM 2562 (Sixth Circuit, 1982), Local 120 vs. FMC Corp., 658 F2d 1285, 1291, 1292 (Ninth Circuit, 1981), Kaftanzis vs. D. L. Transportation Co., 531 F.Supp. 566 (ND/ILL, 1982), Collins vs. Car Carriers, Inc. 536 F. Supp 776 (ND/ILL, 1982), Creer vs. U. S. Postal Service, 109 LRRM 2706, (ND/ALA, 1981), Benson vs. General Motors Corp., No. 81-M-0146 (ND/ALA, 1982), the National Labor Relations

Act may be applied in other District and Circuit Courts in the future. (e.g. McQuay vs. Bethlehem Steel, 109 LRRM 2161 (D/MD, 1981). Justice Rehnquist in Mitchell, Supra, noted at 101 S.Ct. 1564, Footnote five, eight states had no time limitations in their Arbitration Statutes.[4] A District Court in one of those states in Nevils vs. McAndrew Contractors, 522 F. Supp. 526 (MD/TENN, 1981), selected the State Tort Statute. Thus, in those states having no arbitral time limitations, a Statute other than the State Arbitration Statute must be selected.

These legitimate, but nonetheless confusing interpretations frequently resulting in strikingly different results is graphically illustrated by the concluding observation of District Judge Bua in Collins vs. Car Carriers, Inc., 536 F.Supp. 776, 780, who selected the

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[4] Iowa recently passed a State Arbitration Statute. The other seven states are Kentucky, Tennessee, West Virginia, Virginia, Montana, North Dakota, and Nebraska.

six-months statute of the National Labor Relations Act and Opined:

> "This Court is of the opinion that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate determination of this litigation."

Moreover, many of the 43 states which do have arbitration laws and procedures governing the vacation of Arbitration Awards are by these terms expressly inapplicable to labor disputes.[5]

Although the Mitchell selection of the State Arbitration Statutes was designed to enhance the policy of rapid resolution of labor disputes, many of the state arbitral statutes were enacted prior to this Court's

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[5] See Badon vs. General Motors Corp., 110 LRRM 2562, 2565 (Sixth Circuit, 1982). South Carolina 15.3.530 (1980 Edition). See Also - Alaska State Statutes 09.43.010. Arkansas Statutes Ann. 34-511, Idaho Statutes 7-901. Louisiana 9:4201. Maryland, Courts and Judicial Proceedings, Article 3-206(b). Michigan, Chapter Fifty G.C.R. 769.9(2). Texas Rev. Civ. Stat. Ann. Title Ten, Art. 224. Washington Rev. Code Ann. 7.04.010

formulation of the fair representation doctrine in 1944. It is therefore, apparent that many states enacted their arbitral statutes without considering the policy questions unique to labor disputes or national goals addressed by the Labor Management Relations Act of 1947. [6]

Thus, it presently appears in some jurisdictions that a two-tiered system of limitation periods have developed based upon whether a union improperly processes a grievance to the end of the arbitral trail in which event arbitral limitations applies. In other cases, where the union either refuses to initiate or withdraws a grievance from arbitration, the Contract or Tort Statute are selected which does violence to the policy in Mitchell, Supra, that the grievance and arbitral process not be suspended in limbo for long periods.

Finally, every litigant in a fair representation/301 suit is bound by the burden of proof imposed by Hines vs. Anchor Motor Freight, Inc., 424 U.S. 554 (1976)

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[6] See Alabama, Title Seven, Section 829, 843 (1940). New Hampshire Chapter 138 § 1 P. 430 (1945). Washington State Enacted Laws of 1943. West Virginia (108 § 1 (1923). Tennessee Code 1932, 9359.

Consequently, when a litigant initiates suit against a union and company separately or together, the question of which limitation period applies frequently depends upon such fortitious factors as the forum, and very often the whimsical interpretations of the Court concerning the appropriate period of limitations.

Ironically, the continuing selection of State Contract and Tort Statutes which were expressly rejected in Mitchell, Supra, demonstrates the need for further clarification by this Court to eliminate the chaos and confusion that these decisions portend.

Petitioner respectfully contends that this Court's dual policies in labor relations disputes which encourages uniform national policies [7] and relatively rapid disposition of labor disputes [8] necessitates adoption of the six-months

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[7] Teamsters Local vs. Lucas Flour 369 U.S. 95 (1962) Textile Workers vs. Lincoln Mills 353 U.S. 348 (1957).

[8] Auto Workers vs. Hoosier Cardinal 383 U.S. 696 (1966): United Parcel Service vs. Mitchell, 451 U.S. 60 (1981).

limitation period in the National Labor Relations Act in 301 suits.

At various times, a majority of justices who decided Mitchell, Supra, favored a uniform federal statute for all 301 Actions (e.g., White J. Brennan, J. (Auto Workers vs. Hoosier Cardinal 383 U.S. 709 et. seq.). Some preferred the National Labor Relations Act in a 301 fair representation Action filed against an employer. (Stewart J. Blackmun, J.) United Parcel Service vs. Mitchell 451 U.S. 60 (1981)) and one justice urged the selection of the National Labor Relations Act against a union in a 301 fair representation Suit. (Stevens, J. United Parcel Service vs. Mitchell, 451 U.S. 68 (1981)).

Furthermore, the majority of justices in Mitchell, did not reject the application of the six-months limitation period in the National Labor Relations Act but simply stated that the issue was not before them. 101 S.Ct. 1562, 1563.

The primary reason why the National Labor Relations Act should be selected is that it represents the closest analogous Statute of Limitations which would uniformly apply to all unfair representation/301 Cases in every jurisdiction as long as the labor contract requires arbitration.

Nice questions, such as the unions' refusal to initiate or take a grievance to arbitration, the forum of the litigation, the failure of a State to have a time limitation in its arbitral statute or be expressly inapplicable to labor disputes or deciding the conflicts of law question when an arbitration is performed outside the jurisdiction of the forum state hearing the case (see Bigbee vs. Local 142 530 F.Supp. 402, 404, 405 (ND/ILL, 1982) would no longer govern the selection process and irrationally short time periods, such as ten days, twenty days, and thirty days in some states (see Appendix A) and as long as ten years in other states would be eliminated. The distinction drawn by the Second Circuit

in Flowers, the First Circuit in Sear and Seventh Circuit in Davidson between suits against the Union and Company would be abolished thereby guaranteeing the certainty which truly promotes the rapid resolution of labor disputes.

The best argument in support of a uniform national statute is cogently expressed by Justice Stewart in two labor cases Occidental Life Insurance Co. vs. EEOC 432 U.S. 355, 367 (1977) and in the concurring Opinion in United Parcel Service vs. Mitchell 101 S. Ct. 1566 (1981).

In United Parcel Service vs. Mitchell at 101 S.Ct. 1565, Justice Stewart concluded in adopting the National Labor Relations Act as the appropriate statute of limitations that a fair representation suit did involve:

> "Those consensual processes that Federal Labor Law is chiefly designed to promote--the formation of the agreement and private settlement of disputes under it."
> cf. Auto Workers vs. Hoosier Cardinal 383 U.S. 696, 702

> "The case before us is quite unlike the one in Hoosier. It is a hybrid § 301 and breach of duty suit," Vaca vs. Sipes 386 U.S. 171, 197 n. 18 87 S.Ct. 903, 920 n. 18, 17 LED 2d 842 brought by an employee against his employer

> and his union in order to set aside a "final and binding" determination of a grievance, arrived at through the collectively bargained method of resolving the grievance. IT IS THEREFORE A DIRECT CHALLENGE TO THE PRIVATE SETTLEMENT OF DISPUTES UNDER [THE COLLECTIVE BARGAINING AGREEMENT]."

The Court, in another labor dispute in Occidental Life Insurance Co. vs. EEOC 432 U.S. 355, 367 (1977) held:

> "This Court has not mechanically applied a State Statute of Limitations simply because a limitations period is absent from a federal statute. State legislatures do not devise their limitation periods with national interests in mind, and it is the duty of Federal Courts to assure that the importation of state law will not interfere or frustrate the implementation of national policies. State limitation periods will not be borrowed if their application would be inconsistent with the underlying policies of the Federal Statute."

This approach finds support in the proposition that a breach of duty of fair representation is also an unfair labor practice to which the procedures of the National Labor Relations Act apply. See Ford Motor Co. vs. Huffman 345 U.S. 330, 338 (1953). Sayre vs. Oil Workers 350 U.S. 892 (1955).

Humphrey vs. Moore 375 U.S. 335, 342 (1964). Vaca vs. Sipes 386 U.S . 171, 182 (1967) and Electrical Workers vs. Foust 442 U.S. 42, 46 Note 8 (1978). Therefore, the National Labor Relations Act's limitations should apply.

In Hines vs. Anchor Motor Freight 424 U.S. 554 (1976), this Court held it was an indispensable predicate for a litigant to prove a breach of duty of fair representation to prevail.

Accordingly, this Court should grant the Petition for the Writ of Certiorari on this ground as well.

III. THIS COURT'S DECISION IN UNITED PARCEL SERVICE vs. MITCHELL SHOULD BE APPLIED PROSPECTIVELY

* * * *

There is a direct conflict between the Fourth Circuit's Decision in this case (See Apprendix B, P. 1 and 2) and the Ninth Circuit Court of Appeals in Singer vs. Flying Tiger 652 F2d 1349, 1352 (1981) over whether Mitchell, Supra, should be applied in a propsective or retrospective

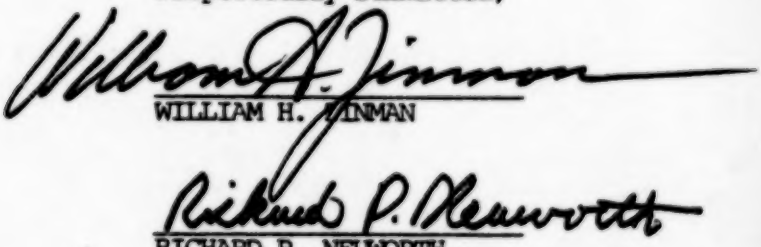
fashion to suits filed in 1978. This Court's latest pronouncement in Chevron Oil Co. vs. Huson 397 U.S. 404 (1971) held such limitation decisions should be applied prospectively.

CONCLUSION

* * *

For all of the above reasons, the Petition for the Writ of Certiorari should be granted.

Respectfully Submitted,



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APPENDIX A

STATE STATUTES OF LIMITATIONS

STATE STATUTES OF LIMITATIONS GOVERNING ACTIONS TO VACATE ARBITRATION AWARDS.

Alabama Code 6-6-15 (10 days)

Ariz. Rev. Stat. Ann. § 12-1506 (10 days)

Conn. Gen. Stat. Ann. § 52-420 (West) (30 days).

Hawaii Rev. Stat. § 658-11 (10 days)

Md. Stat. Ann. CJ § 3-224 (30 days)

Mass. Gen. Laws Ann. Ch. 150c § 11 (30 days)

Mich. Gen. Court Rules 769 (20 days)

Ore. Rev. Stat. § 33.310 (20 days)

Vt. Stat. Ann. tit. 21 § 541 (30 days).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PHILIP DELCOSTELLO,

Appellant,

Vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendant,

AND

LOCAL 577, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMENT AND HELPERS OF AMERICA, AND ANCHOR MOTOR FREIGHT, INC.,

Appellees.

NO. 81-2086

UNPUBLISHED

Appeal from the United States District Court for the District of Maryland at Baltimore. Shirley B. Jones, District Judge.

Argued March 30, 1982
Decided April 19, 1982

Before: WINTER, Chief Judge
BRYAN, Senior Circuit Judge
and HALL, Circuit Judge

PER CURIAM:

After plaintiff unsuccessfully submitted his claim for wrongful discharge to binding arbitration under a

collective bargaining agreement, he sued his former employer, alleging wrongful discharge in breach of contract, and his union, alleging breach of the duty of fair representation. The arbitrators' award in favor of the employer was made on July 18, 1977, and plaintiff received a copy several days later. Suit was not instituted until March 16, 1978.

Relying upon United Parcel Service vs. Mitchell, 451 U.S. 56 (1981), the district court dismissed the suit and ruled that it was barred as to both the employer and the union by the thirty-day limitations period contained in Md. Code Ann., Cts. and Jud. Proc. § 3-224 (Repl. Vol. 1980).

We think that the district court was correct in its conclusion, and we affirm on the basis of its memorandum and order. See Delcostello v. International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, Civil Action No. J-78-436 (D.Md., Oct. 22, 1981).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILIP DELCOSTELLO

Plaintiff)

Vs.) CIVIL ACTION NO. J-78-436

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.)

Defendants)

MEMORANDUM AND ORDER

Plaintiff instituted this action under the Labor Management Relations Act, 29 USC § 185, against his employer, Anchor Motor Freight, Inc., for his allegedly wrongful discharge on June 27, 1977, and against Local 557, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter referred to as the Local) and the International Brotherhood of Teamsters (hereafter referred to as the International) for breach of the duty of fair representation in connection with the grievance arbitration proceeding. The action arose out of an incident that occurred on June 27, 1977. Plaintiff reported for work and was assigned a tractor-trailer to use in

transporting a load of new automobiles from Baltimore to Montreal, Canada and a return trip with another load to Washington, D.C. Plaintiff inspected the truck and reported several conditions he thought needed repair to the maintenance shop foreman. Some repairs were made, and the plaintiff was later told that the truck was ready. Plaintiff contended that all the items he had noted as needing repair were not performed, that driving the truck in its condition then would be dangerous, and refused to drive the truck. The company contended that all necessary repairs had been made and the truck was safe to drive. Plaintiff's continued refusal to drive the truck resulted in his termination. 1/

Plaintiff contacted Arthur C. Morningstar, business agent for the Local. Unresolved at the local level, the matter was heard on July 10, 1977 by the Eastern Conference Automobile Transporters Joint Committee in a formal grievance proceeding. The Eastern Conference panel ruled in favor of the employer. Plaintiff alleges that he was inadequately represented by the Union at that proceeding. Suit was filed in this Court on March 26, 1978.

1/ Plaintiff contends that he was fired; the company contends that his refusal to drive the truck, upon being directed to do so, was regarded as a voluntary quit.

All three defendants filed motions for summary judgment. The International's motion was never answered by plaintiff. Plaintiff responded to the motions of the Local and Anchor Motor Freight, and oral argument before this Court was held March 6, 1981. The International's motion for summary judgment was granted in an oral ruling at the hearing, and its request for attorneys'fees and costs was denied. Ruling on the motions of the employer and the Local was deferred at the hearing, and this opinion now addresses those motions.

Some of the same grounds for summary judgment are asserted by the Local and the Employer, and the common grounds are treated together.

1. Failure to exhaust intraunion rememdies.

The Teamsters constitution, Art. XIX § 12(a) requires that "every member...against whom adverse rulings or decisions have been rendered or who claims to be aggrieved, shall be obliged to exhaust all remedies provided for in this Constitution and by the International Union before resorting to any Court..." Article XIX, §1, sets up procedures by which members may prefer charges against another member or any officer, with trial by the Local's Executive Board. If disciplinary action is taken against the member, he may appeal

to the Joint Council. Plaintiff admittedly exhausted the contractual grievance remedy for his discharge but did not initiate any of the proceedings provided for in the Teamsters constitution for charges or grievances brought against union members and officers.

The Fourth Circuit has applied the exhaustion of intraunion remedies doctrine in cases involving claims under Labor Management Reporting and Disclosure Act (LMRDA), but no published opinions have applied it in suits such as this, under the Labor Management Relations Act (LMRA). Courts of appeals in other circuits have, however, applied the exhaustion doctrine to actions brought under § 301 of the LMRA. Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1214 (9th Cir. 1980); Winter v. Local Union No. 639, 569 F2d 146 (D.C. Cir. 1977); Newgate v. Modine Mgf. Co., 495 F2d 919 (7th Cir. 1974); Imel v. Zohn Mfg. Co., 481 F2d 181 (10th Cir. 1973); Brady v. Transworld Airlines, Inc., 401 F2d 87 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969); Bsharah v. Eltra Corp., 394 F2d 502, 503 (6th Cir. 1968) (per curiam) (alternate holding). At least two judges of this district have also done so. Fabian v. Freight Drivers & Helpers Local No. 557, 448 F.Supp. 835, 839 (D.Md. 1978) (Young, J.); Murray v. Branch Motor Express Co., Civ. No. HM-78-1717 (D.Md., July 31, 1979), aff'd

No. 79-1485 (4th Cir. 1980. But see Fox v. Mitchell Transport, Inc., Civ. No. Y-80-1596 (D.Md. Feb. 3, 1981) (Young, J.).

Exhaustion of internal remedies may be excused in a number of instances. The Fourth Circuit recently summarized the exceptions recognized in LMRDA actions. Exhaustion is excused when a disciplinary action taken against a member was illegal or "void" or where, for any reason, the remedy would be inadequate, illusory or futile. Keeffe Bros. v. Teamsters Local Union No. 592, 562 F2d 298 (4th Cir. 1977). The latter exception is relevant to suits under the LMRA, e.g., Winter v. Local Union No. 639, 569 F2d 146 (D.C. Cir. 1977), and it has been said to apply where the internal procedures afforded clearly provide no way to obtain the relief requested, see id. at 149, or where union hostility is shown, id. The hostility involved would be that of the union officials who hear the complaint.

The many cases in this area, only a few of which have been cited here, are conflicting, and factual distinctions alone cannot account for the different results. It appears that the Supreme Court will resolve the issue this term, certiorari having been granted in Clayton v. ITT Gilfillan, 49 USLW 3332 (U.S. Nov. 3, 1980. That, of course, does not relieve this Court of its responsibility to decide the matter now.

The appropriate approach, however, is to examine each case in light of the purpose of the exhaustion requirement, which is to afford the union an opportunity to correct its own wrongs or problems before suit. E.g., Wiglesworth v. Teamsters Local No. 592, 552 F2d 1027 (4th Cir. 1976). Given that purpose, the first inquiry is whether the wrong complained of is one that relates to internal union affairs. Cases arising under the LMRDA are, by definition, such matters, and some cases brought under the LMRA may also be of such a nature. The second major inquiry is whether the internal procedures are sufficient to enable the union member to secure relief. This approach was taken by the Court of Appeals for the District of Columbia in two recent cases involving the remedies at issue here under the Teamsters constitution. Chambers v. Local Union No. 539, 578 F2d 375 (D.C. Cir. 1978); Winter v. Local Union No. 639, 569 F2d 146 (D.C. Cir. 1977). In the Winter case the plaintiff asserted a breach of the duty of fair representation by the Union's failure to process a grievance; in the Chambers case, the breach alleged related to the union's conduct following arbitration of a seniority grievance, including its representation at a second grievance hearing. The District of Columbia Court of Appeals affirmed a dismissal for failure to exhaust in the

Winter case. It noted, as to the Union, that although money damages would not have been available, the disciplinary sanctions could have provided the equivalent of injunctive relief sought. 569 F2d at 149. In Chambers, the facts of which admittedly involved a more serious breach than is alleged here, the Court pointed to the facts that the case related to the employment relation, not a merely internal matter, and that the union proceedings could not produce the remedies of assignment of work by the employer and damages. 578 F2d at 387. A significant factor in Chambers was the union's bias and conflict of interest, id. at 388. The Seventh Circuit has, however, reached a similar conclusion in Miller v. Gateway Transp. Co., 616 F2d 272 (7th Circ. 1980). The Court of Appeals reversed summary judgment in favor of the employer on the exhaustion ground. Assuming that the defense was available to an employer,[2/] it noted that the union remedies available to its members did not include setting aside a grievance award or other relief from the employer. Id. at 275. This Court finds persuasive the

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[2/] Courts have differed on the question when and whether an employer, as well as a union, may raise failure to exhaust intraunion remedies. Compare, e.g., Geddes v. Chrysler Corp., 608 F2d 261 (6th Cir. 1979) with Harrison v. Chrysler Corp., 558 F2d 1273, 1278-79 (7th Cir. 1977). It is not necessary here to reach the question.

the reasoning of those courts that have held the remedies available through the Teamsters constitution to be inadequate to afford relief where the plaintiff asserts a claim against his employer for breach of the collective bargaining agreement and against the union for breach of its duty of fair representation by representation at a prior grievance proceeding. Miller v. Gateway Transp. Co. 616 F2d 272 (7th Cir. 1980); Chambers v. Local Union No. 539, 578 F2d 373 (D.C. Cir. 1978); see Winter v. Local Union 539, 569 F2d 146, 150-51 n. 26 (D.C. Cir. 1977). This decision does not conflict with cases in which the Fourth Circuit has apparently sanctioned the Teamsters procedures for prosecution of claims involving internal affairs.

2. Limitations

The Local and the Employer assert that plaintiff's action is barred by limitations. The decision of the Joint Council was an arbitration proceeding; therefore, the appropriate time for filing suit was within the Maryland period for vacation of an arbitration award, 30 days, Md. R.P. E4; Md. Cts. & Jud. Proc. Code Ann. § 3-224, or 90 days.

As the Local has pointed out, this Court recently decided that the appropriate statute of limitations to be applied to an action for the union's breach of the duty of fair representation is the three-year statute of limitations,

on the basis that such a suit cannot be equated with an action to vacate an arbitration award. This Court continues to find the reasoning of the Second Circuit in Mitchell v. United Parcel Service, 624 F2d 393 (2d Cir. 1980), cert. granted, 49 USLW 3270 (Oct. 14, 1980); more persuasive than that of the Third Circuit in Liotta v. National Forge Co., 105 LRRM 2636 (3rd Cir. 1980) with respect to both the union and the employer.

The Supreme Court will apparently decide this question soon, certiorari having been granted and argument heard in Mitchell the week of February 23, 1981.

The employer also makes the argument that suit should be barred for untimeliness on equitable grounds, arguing that had it known plaintiff was "disavowing" the union's representation it could have avoided the expense of preparing the case for arbitration or, if notified shortly after the proceeding, could have moved to vacate the arbitration award. Plaintiff certainly could not "disavow" the union as a representative in bringing its grievance. The latter alternative formulation is simply the limitations argument in another guise. If plaintiff has no obligation to bring his action within the time for vacating arbitration award, he has no obligation to advise his employer he is dis-

satisfied with the union's representation within the same period.

3. Punitive damages

The Local is entitled to summary judgment on the issue of punitive damages. The Supreme Court has held that punitive damages cannot be assessed against a union that breaches its duty of fair representation by failure to properly pursue a grievance. International Brotherhood of Elec. Workers v. Foust, 442 U.S. 42, 52 (1979). Its rationale, that depletion of a union treasury through a punitive damage award could impair its effectiveness as a collective bargaining agent, id. at 50-51, is equally applicable to a breach by failure to represent a member properly in connection with a grievance.

The Employer is likewise entitled to summary judgment on the issue of punitive damages, but for a different reason. Plaintiff asserts that the employer breached the collective bargaining agreement by discharging him; he also alleges a conspiracy between his employer and the unions to remove him from his job. Although there might be instances in which an employee could recover punitive damages for a discharge, the facts properly before this Court on motion for summary judgment do not create any factual issues as to

malicious or other egregious conduct on the part of the employer.

Although summary judgment could not be granted if the undisputed facts were subject to inferences favorable to plaintiff, the fact of termination alone, without more, does not give rise to such an inference. The Employer has submitted affidavits establishing that certain repairs were performed on the tractor-trailer plaintiff refused to drive and that the rig was thereafter driven by Curtis Aiken to Canada and back without malfunction. Although the affidavits do not preclude a finding that plaintiff might nonetheless have been justified in refusing to drive the truck, plaintiff has not presented any factual materials to support his contentions regarding his prior complaints, his conversation with mechanics, and other facts upon which he relies. Plaintiff relies on facts previously stated in his deposition and apparently on some statements in the deposition of James Gasper. No depositions have been filed in this case, and thus the Court cannot assume any facts asserted in them. There is no requirement of filing depositions under the federal rules, but if they are relied upon, they must be before the Court. The purpose of a motion for summary judgment is to require that

allegations be tested in light of specific facts. See 10 C. Wright & A. Miller, Federal Practice and Procedure § 2739. The moving party bears the burden of demonstrating that the factual material upon which it relies entitles it to summary judgment, id., e.g., Addicks v. S.H. Kress & Co., 397 U.S. 144 (1970), but a party who fails to come forward with proper factual material takes a risk that the evidence before the Court will be sufficient to sustain that burden.

In addition to the absence of facts supporting malice or something similar in the circumstances of the termination, there are no facts to support a finding of conspiracy between the Employer and the Local.

4. The Employer

The Employer asserts that the arbitration proceeding on plaintiff's termination grievance is conclusive. This, of course, is true, but Hines v. Anchor Motor Freight Service, 424 U.S. 554 (1976), establishes that a prior arbitration is no bar to suit against the Employer where the union's breach of duty of fair representation has tainted the arbitration process. The Employer also asserts that it is entitled to summary judgment

on that issue . On the facts before this Court, summary judgment cannot be granted.

A union breaches its duty of fair representation when its conduct is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 368 U.S. 171, 190 (1967). Something more than negligence must be present, and a union may exercise discretion in representing employees, Wyatt v. Interstate & Ocean Transport Co., 623 F2d 888, 891 (4th Cir. 1980). In applying the Vaca standard, the Fourth Circuit has held that a union's conduct must meet three standards and that a breach of one may constitute a basis for a cause of action. The union must treat all segments of its membership without hostility or discrimination, must exercise its admittedly broad discretion in "complete good faith and honesty," and must avoid arbitrary conduct. Id. at 890-91 (quoting Griffin v. International Union, United Automobile A. & A.I.W., 469 F2d 181, 183 (4th Cir. 1972)).

In this circuit, neither actual ill will nor intentional conduct is necessary to find a breach. Wyatt v. Interstate & Ocean Transport, 623 F2d at 891. The "arbitrary" conduct referred to in Vaca may consist of gross indifference or deficiency in a duty. Id.

Failure to investigate a grievance, for example, as plaintiff asserts, may constitute arbitrary conduct. DeArroyo v. Sindicate de Trabajous Packing, 425 F2d 281 (1st Cir. 1970); see Hines v. Anchor Motor Freight Service, 424 U.S. 554 (1976). The factual material submitted by the Employer does not establish that there are no disputes of material facts entitling it to summary judgment as a matter of law. As noted before, the depositions are not on file in this case. The Employer submitted some pages of the plaintiff's deposition relating to the grievance hearing. Although plaintiff has not properly controverted these materials, even if consideration of those excerpts is proper, they fail to establish that defendant is entitled to judgment as a matter of law.

Summary judgment on the issue of punitive damges will be entered in favor of the Local and the Employer, and otherwise will be denied.

/S/ SHIRLEY B. JONES
United States District Judge

Dated: March 17, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILIP DELCOSTELLO,

Plaintiff

Vs.) CIVIL ACTION NO. J-78-436

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMENT AND HELPERS OF AMERICA, ET AL.)

Defendants)

MEMORANDUM AND ORDER

This action was brought under § 301 of the Labor Management Relations Act against plaintiff's employer, Anchor Motor Freight, Inc., for wrongful termination and against Teamsters International and Local 557 for breach of the duty of fair representation. The incident that resulted in plaintiff's termination occurred on June 27, 1977, and a grievance against the employer was heard by the Eastern Conference Automobile Transporters Joint Committee on July 19, 1977, which decided in favor of the employer. Plaintiff received a copy of the arbitration decision "several days later." On August 20, 1977, he received a copy of the minutes of the July 1977 meeting from Arthur C. Morningstar, with a letter asking that he forward

any changes, in writing, or the minutes would be approved. Plaintiff consulted with an attorney and, on September 14, 1977, wrote the president of Local 557 expressing his dissatisfaction with the decision and the union's representation of him. Suit was filed on March 16, 1978.

This Court ruled on defendants' motions for summary judgment on March 17, 1981. The argument that this action was barred by the Maryland 30-day limitations period for vacating arbitration awards was rejected, and the three-year limitations period was applied. The Supreme Court decided United Parcel Serv., Inc., v. Mitchell, 101 S. Ct. 1559 (1981), on April 20, 1981. It held that New York's 90-day limitations period of vacating an arbitration award was the analogous state statute to be applied in a § 301 action against an employer where an arbitration award had been entered in favor of the employer. Local 557 and Anchor Motor Freight filed a joint motion for reconsideration of the prior ruling on limitations in light of Mitchell. Plaintiff has responded, and the parties have briefed the issue extensively. No oral argument is deemed necessary. See Local Rule 6.

The primary question presented is whether Mitchell

should be applied retroactively. There is no question that, if it can be applied retroactively, Mitchell governs. Although only the employer was before the Court, it is reasonably clear from the Supreme Court's opinion that the short limitations period would apply to a companion action against a union for breach of the duty of fair representation. See Singer v. Flying Tiger Line, Inc., 652 F2d 1349, 1353 (9th Cir. 1981). But see Sear v. Cadillac Automobile Co., 654 F2d 4, 6-7 (1st Cir. 1981) (dictum).

Exactly when the plaintiff received the Eastern Conference decision is not clear; plaintiff states that it was "several days" after the July 19, 1977 meeting. Plaintiff had the decision at some point before he received Mr. Morningstar's letter on August 20, 1977.

Plaintiff urges that his September 14, 1977 letter should be treated as a request for reconsideration of the arbitration decision, tolling the statute of limitations until he received a response. No formal response was ever made by the Eastern Conference or Local 557, but plaintiff was aware no later than December 1977 that nothing more would be done by the Local and the Eastern Conference. [1/]

[1/] See Plaintiff's Affidavit of May 26, 1981, ¶ 6.

Even assuming that limitations did not begin to run until plaintiff was told that no further action would be taken, in late December, 1977, this action was filed more than 30 days after that time. Cf. Davidson v. Roadway Express, Inc., 650 F2d 902, 904 (7th Cir. 1981) (even assuming attempts to reopen arbitration tolled statute, claim barred).

The Supreme Court summarized the factors to be considered in deciding whether a new decision should be applied retroactively in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Huson, a Chevron employee, had sued, under the Outer Continental Shelf Lands Act, for injuries sustained on a drilling rig off the coast of Louisiana. Before and at the time of suit, federal courts had applied general admiralty law, including its laches doctrine of timeliness, to suits for injuries under the Outer Continental Shelf Lands Act. While Huson's case was still in the discovery stage, the Supreme Court held in Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969), that the Act should not be read as making admiralty law applicable to suits for personal injuries under the Act. The district court accordingly held that Huson's action was time barred under a one-year state statute of limitations, but the Fifth Circuit

reversed. The Supreme Court held that the state one-year statute was the appropriate limitations period but also held that the decision would not be applied retroactively.

The Court identified three factors to be used in deciding whether to apply a decision nonretroactively. First, the decision sought to be applied only prospectively must establish a new legal principle, either by overruling "clear past precedent" or by deciding a case of first impression, resolution of which "was not clearly foreshadowed" in earlier cases. Id. at 106. The prior history, purpose and effect of the rule are to be weighed, to determine whether retroactive application furthers or retards its operation. Id. at 106-07. Finally, retroactive operation must be weighed to see whether substantial injustice or hardship is caused. Id. at 107.

The three factors are interrelated. The first and third factors combined, for example, require analysis of a "reliance factor." Cash v. Califano, 621 F2d 62, 629 (4th Cir. 1980). As the U. S. Court of Appeals for the Fourth Circuit recently stated, "absent some surprise engendered by a current judicial interpretation, a litigant cannot be heard to demand nonretroactivity on the basis of inequity." Id. Retroactive application is the norm, and

the party urging nonretroactivity bears the burden of establishing sufficient equitable reasons to overcome the norm. Id.

Past precedent in the Supreme Court and the Fourth Circuit on the issue decided in Mitchell cannot be described as "clear." The Supreme Court held in UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), that the timeliness of a § 301 action is to be determined by reference to the appropriate state statute of limitations. Id.at 704-05. The case was an action on behalf of an individual employee against his employer; the question was whether the limitations period for actions based exclusively on written contracts or for those based on oral contracts should be applied. There was a written collective bargaining agreement and an oral employment contract between the employee and the employer. Noting that the characterization of the action was matter of federal law, the Court stated that there was no reason to reject a state law characterization unless it was unreasonable or inconsistent with national labor policy. Id. at 706. The Court held that the state law characterization of the action as one not based exclusively on a written contract was acceptable and not in conflict with labor policy. Id. at 706-07. Prior

arbitration was not an issue in the case.

There was no prior case of the U. S. Court of Appeals for the Fourth Circuit addressing the question decided in Mitchell. The Court held in Kennedy v. Wheeling Pittsburgh Steel Corp. 81 LRRM 2349 (4th Cir. 1973) (per curiam), an unpublished opinion, that a § 301 action against a union was barred by a state's five-year statute of limitations on suits on oral contracts, reasoning that the same limitations period should apply to a suit against the union as applied to that against the employer. The question whether a statute of limitations for vacating arbitration awards barred suit was not before the Court, although the union had argued that the six-month limitations period of the Labor Management Relations Act or the state limitations period for tort actions applied, see id. at 2349.

The limitations question in Mitchell had not been previously presented to the Supreme Court. The case is not, however, one of first impression in the same sense as Rodrique v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969), the decision with which Chevron Oil dealt was. Hoosier Cardinal has established some general principles, and Mitchell applied them. Admittedly, more than a routine

application was involved. The relatively rare instances. in which courts have applied decisions prospectively in the civil area have usually involved a " 'clear break with the past,' " Ramey v. Harber, 589 F2d 753, 758 (4th Cir. 1978) (quoting Desist v. United States , 394 U.S. 244, 248 (1969)), and often the "past" is long and well established, e.g., id. Here there was no such "past." Although it was reasonable for plaintiff or his attorney to read Hoosier Cardinal and cases in other jurisdictions, in the absence of clear authority otherwise, as allowing a limitations period of three years, the burden cast upon a litigant urging nonretroactivity has not been met with respect to the essential element for prospective application. That burden casts, in an unclear or developing area of the law, even his well-informed or reasonable belief, upon the plaintiff here. Because plaintiff cannot meet the Chevron Oil test with respect to that element, it is unnecessary to consider other factors. See Cash v. Califano, 621 F2d at 629.

A few other courts have been faced with the problem of retroactive application of Mitchell, although none of the cases reported to date is extremely helpful. The

U. S. Courts of Appeals for the First and Seventh Circuits have applied Mitchell retroactively, although neither court analyzed the question in terms of the Chevron Oil factors. Sear v. Cadillac Automobile Co., 654 F2d 4 (1st Cir. 1981); Davidson v. Roadway Express, Inc., 650 F2d 902 (7th Cir. 1981). In Sear the Court discussed Mitchell, apparently assuming retroactivity, but held that Mitchell only applied to a suit against an employer, not to a suit against a union for breach of the duty of fair representation. 654 F2d at 6-7. The Seventh Circuit following Mitchell without discussing retroactivity. See also Scott v. Chrysler Corp., 107 LRRM 308 (ED/MICH, 1981).

The only case in which retroactivity is discussed is Singer v. Flying Tiger Line, Inc., 654 F2d 1349 (9th Cir. 1981). The Court noted "a critical factor is that the rule of the Mitchell case is not one which might have been anticipated." Id. at 1353. It declined to apply Mitchell retroactively. Singer is not completely apposite. Mitchell was decided after the district court decision had been appealed but before oral argument. The union and employer had not urged below that the state limitations period for vacation of arbitration awards applied, and the

Ninth Circuit noted that normally grounds not raised below are not considered on appeal. Id.

As previously mentioned, my reading of Mitchell is that where the breach of the duty of fair representation complained of relates to the union's presentation of the employee's grievance at an arbitration hearing resolved in favor of the employer, the same limitations period will be applied to the action against the union as to the underlying action against the employer. Joint presentation and trial of the two claims is virtually compelled by the nature of the concomitant actions against the employer and union in § 301 cases. Plaintiff must now bring suit against the employer within the period of time for vacating the arbitration award in any event and is not substantially burdened by having to sue the union at the same time.

Plaintiff has asserted that the Maryland 30-day limitations period for vacating arbitration awards is unconstitutional, at least as applied to this action or to § 301 actions generally. The Maryland statute, Cts. & Jud. Proc. Code Ann. § 3-224, provides that a petition to vacate an arbitration award is to be filed within 30 days after delivery of a copy of the award to the petitioner, id. § 3-224(a)(1), and specifies five grounds

upon which an award is to be vacated, id. § 3-224(b). One of the grounds is that an award as "procured by corruption, fraud, or other undue means," id. § 3-224(b)(1), and where that is the ground for the petition to vacate, the period of limitations begins when the ground became known, or should have become known, to the petitioner, id. § 3-224(a)(2).

Plaintiff relies in part on the general principle that when a new limitations period is applied to existing causes of action a reasonable time period must be allowed for assertion of existing rights. That principle is applied to statutory enactments. The principles concerning retroactive application of decisions implicate similar concerns, but, as previously noted, they do not dictate nonretroactive application of Mitchell.

Plaintiff also contends that a 30-day period is simply too short a time to be applied to a § 301 action. He points out that although 30-day time periods are common for filing appeals from trial court or administrative decisions, normally counsel has already been retained and is familiar with the facts of the case, so that filing an appeal is a relatively short process. This is not true of a § 301 suit. Employees are forbidden from being

represented by counsel at a labor arbitration proceeding, rather they must be presented by the union. It is not necessarily true that individuals are generally represented by counsel at administrative proceedings, although they may be, if they wish. The 30-day limitations period, Md.R.P. B4, for seeking judicial review of an administrative determination will be applied whether a petitioner was represented by counsel or not.

As previously noted, it may well be that plaintiff's tolling arguments have merit, and I have here assumed, for the purpose of deciding the motion, that the limitations period began in December, 1977. In considering plaintiff's argument that 30 days, as opposed to the 90-day period in Mitchell, is too short a time, it is important to note the scope of Mitchell. This Court does not read that case as broadly as does the plaintiff. Mitchell involved an allegation that the union had breached its duty of fair representation by the manner in which it handled the grievance. See Mitchell v. United Parcel Serv., Inc. 624 F2d 394, 396 (2d Cir. 1980), rev'd, 101 S. Ct. 1559 (1981). That was the allegation in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), upon which the Mitchell

court relied in its characterization of the action as analogous to an action to vacate an arbitration award. The kind of conduct typically alleged, as here, is a union's failure to investigate the facts of the grievance or to present the employee's case properly at the hearing. This conduct will generally be known to the employee at the arbitration hearing. I do not read Mitchell as precluding, in the proper circumstances, the application of a "saving" provision such as is contained in § 3-224(a)(2), where fraud, coercion or the like is involved. Although other states have chosen to enact limitations periods for challenging arbitration awards greater than 30 days, see Mitchell, 101 S. Ct. at 1563 n. 5, 30 days is not unconstitutional, either inherently or as applied by a federal court to a § 301 action.

For the reasons set forth in this Memorandum, I shall vacate the prior ruling on the motions for summary judgment of Local 557 and Anchor Motor Freight and, based on Mitchell, enter summary judgment for both defendants on the ground that plaintiff's action is barred by limitations.

Defendants have requested, in addition to summary

judgment in their favor, that this Court award them costs and attorneys' fees. No supporting documents have been submitted. More important, although defendants have ultimately prevailed, the fact that they did so only after the subsequent ruling of the Supreme Court amply demonstrates that this is the kind of case in which an award of costs and attorney's fees is inappropriate.

/S/ SHIRLEY B. JONES
United States District Judge

Dated: October 22, 1981

Office-Supreme Court, U.S.
FILED
JAN 11 1983
ALEXANDER L. STEVAS,
CLERK

NO. 81-2386

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

PHILIP DEL COSTELLO,

Petitioner

v.

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,

Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI JUNE 29, 1982
CERTIORARI GRANTED NOVEMBER 29, 1982

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RECORD ON APPEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 81-2086

PHILIP DEL COSTELLO,

Appellant

v.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, AND
WAREHOUSEMEN AND HELPERS OF
AMERICA, AND LOCAL 557,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF
AMERICA, and ANCHOR MOTOR
FREIGHT, INC.,

Appellees

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

CIVIL

RECORD ON APPEAL FILED:

VOLUME I, II AND III

Date 1978	NR	Proceedings VOL.I
Mar.16	(1)	Complaint, Exhibits 1 through 5 and Prayer for Jury Trial.
Apr.10	(6)	ANSWER of Defendant, Freight Drivers and Helpers Local 557.
" "	(7)	Motion of Defendant, Freight Drivers and Helpers Local 557 to Strike Prayer for Jury Trial; Memorandum; and Attachments. (c/s)
" 21	(9)	ANSWER of Defendant, Anchor Motor Freight, Inc.
May 1	(10)	Response of Plaintiff to Motion of Defendant, Freight Drivers and Helpers Local 557 to Strike Prayer for Jury Trial. (c/s)
" 3	(12)	Motion of Defendant, Anchor Motor Freight, Inc., to Strike Plaintiff's Prayer for Jury Trial; and Memorandum. (c/s)
" 11	(13)	Memorandum of Plaintiff in support of its response to Motion of Defendant, Freight Drivers and Helpers, Local 557, to strike Prayer for Jury Trial. (c/s)
" 17	(14)	Response of Plaintiff to Motion of Defendant, Anchor Motor Freight, Inc., to Strike Plaintiff's Prayer for Jury Trial; Memorandum; and Attachment. (c/s)

Continued on Page 2

Civil Docket Continuation Sheet

Plaintiff	Defendant	J
PHILIP DEL COSTELLO	INTERNATIONAL BROTHERHOOD OF TEAMSTERS,etc., et al.	Dkt. H-78-436 Page 2 of ___ Pages

Date 1978	NR	PROCEEDINGS
Aug. 24	(15)	ANSWER of Defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
" 24	(19)	Memorandum and Order (Harvey, J.), "DENYING" Motions of Defendants, Anchor Motor Freight, Inc., and Local 557 to Strike Plaintiff's Request for Jury Trial. (c/m Judge)
Sept. 12	(20)	Answers of Defendant, Anchor Motor Freight, Inc., to Interrogatories Propounded by Plaintiff; and Exhibit A. (1 c/s)
" 13	(21)	Answers of Defendant Local 557 to Interrogatories Propounded by Plaintiff.
Nov. 28	(22)	Motion of Defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America for Summary Judgment and Attorney's Fees; Affidavit and Exhibit A; Affidavit and Exhibit A; Affidavit in Support of Award of Attorneys' Fees and Exhibit B; and Memorandum and Exhibit C. (c/s)

Continued on Page 3.

Civil Docket Continuation Sheet

Plaintiff	Defendant	J
PHILIP DEL COSTELLO	INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc., et al.	Dkt. H-78-436 Page 3 of ___ Pages

Date			PROCEEDINGS
1980	NR	VOL. II	
Nov.	19	(30)	Motion of Defendant, Anchor Motor Freight, Inc., for Summary Judgment Brief, Affidavits of Richard O'Connell, Curtis Aiken, and Exhibits A thru E. (c/s)
"	19	(32)	Motion of Defendant, Freight Drivers and Helpers Local 557 for Summary Judgment, Statement of Facts, Memorandum and attachments. (c/s)
Dec.	26	(32)	Response of Plaintiff to Motion of Defendants for Summary Judgment, Memorandum and attachments.
1981			
Jan.	5	--	Letter (copy) from Shirley B. Jones to counsel of record setteing (sic) hearing on pending motions for March 6, 1981, at 9:15 a.m.
"	20	(36)	Response to Defendant, Freight Drivers and Helpers Local 557 to reply of Plaintiff to Motion of Defendant, Freight Drivers and Helpers Local 557, for Summary Judgment, and attachments.

Continued on Page 4.

v

Civil Docket Continuation Sheet

Plaintiff	Defendant	J
PHILIP DEL COSTELLO	INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc., et al.	Dkt. H-78-436 Page 4 of ___ Pages

Date 1981	NR	PROCEEDINGS
Feb. 25	(37)	Response of Plaintiff to reply of Defendants to Plaintiff's response to Motion of Defendant, Freight Drivers and Helpers Local 557, for Summary Judgment. (c/s)
Mar. 6	--	Hearing on Motion of Defendants for Summary Judgment and for Attorney Fees.
" 6	(38)	Order (Jones, J.) "GRANTING" Motion, for reasons stated in open court, Motion of Defendant, International Brotherhood of Teamsters, etc., for Summary Judgment and "DENYING", for reasons stated in open court, Motion of Defendant, International Brotherhood of Teamster, (sic),etc., for Attorney's Fees. (See pleading No. 22)
" 17	(39)	Memorandum and Order (Jones, J.) "GRANTING" with respect to liability the Motion of Defendant, International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America for Summary Judgment and "DENYING" request of International Brotherhood of Teamsters, Chauffeurs, and Warehousemen and Helpers

Civil Docket Continuation Sheet

Plaintiff	Defendant	J
PHILIP DEL COSTELLO	INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc., et al.	Dkt. H-78-436 Page 5 of ___ Pages

Date 1981	NR	PROCEEDINGS
Mar. 17	(39)	of America, for Attorney Fees and costs: "GRANTING" with respect to the claim for Punitive Damages, and "DENIED" in all other respects, the Motion of Local 557, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America for Summary Judgment; "GRANTING" with respect to the claim for Punitive Damages, and "DENIED" in all other respects, the Motion of Anchor Motor Freight for Summary Judgment. (c/m 3/17/81 PH)
May 5	(49)	Joint Motion of Defendants for Reconsideration of Court's Order of March 17, 1981, and attachment. (c/s)
		VOL. III
" 27	(54)	Response of Plaintiff to Joint Motion of Defendants for Summary Judgment, Brief, Affidavit of Plaintiff, Philip Del Costello, Request for Hearing, and Exhibits 1 thru 9. (c/s)
June 8	(55)	Motion and Order (Jones, J.), extending the time within which Defendant, Local 557, shall reply

Continued on Page 6.

Date 1981	NR	PROCEEDINGS
June	8 (55)	to the response of Plaintiff to Motion of Defendant, Local 557, for Summary Judgment to and including June 26, 1981.
July	14 (58)	Reply Memorandum of Defendant, Local 557, in support of Motion for Reconsideration of Court's Order of March 17, 1981, and Attachments. (c/s)
"	20 (59)	Retroactive application of Defendant, Anchor Motor Freight, Inc., of new case law to pending civil actions. (c/s)
"	23 (60)	Affidavit of Plaintiff, Philip Del Costello, and attachment. (c/s)
Aug.	7 (61)	Response of Plaintiff to Memorandum of Defendants in replying to Memorandum of Plaintiff and attachment. (c/s)
Oct.	22 (67)	Memorandum and Order (Jones, J.) (c/m 10/22/81 ph)
"	22 (68)	Order (Jones, J.) "GRANTING" Joint Motion of Defendants for reconsideration; "VACATING" Memorandum and Order of March 17, 1981, as set forth; "ENTERING" Judgment

Continued on Page 7.

Civil Docket Continuation Sheet

Plaintiff	Defendant	J
PHILIP DEL COSTELLO	INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc., et al.	Dkt. H-78-436 Page 6 of 7 Pages

Date 1981	NR	PROCEEDINGS
		in favor of Defendants, Local 557,
Oct.	22 (68)	International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Anchor Motor Freight, Inc., against Plaintiff; and "DENYING" request of Defendants for Costs and Attorney's Fees. (c/m 10/22/81 ph)
"	27 (69)	Notice of Appeal of Plaintiff. (Filing fee paid) (c/m 10/30/81) (Transcript purchase order form mailed to counsel and request for additional filing fee 10/30/81)

NOTATIONS AS TO OPINIONS

The lower Court Opinions appear at B-1-30 - (Petitioner Writ of Certiorari).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILIP DEL COSTELLO
204 Perry Avenue
Edgewood, Maryland 21040

Plaintiff

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN AND HELPERS OF AMERICA
(For service of process,)
(Please serve:)
FRANK FITZSIMMONS, President
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
and
LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
(For service of process,)
(Please serve:)
JOSEPH FABULA,
President of Local 557
6000 Erdman Avenue
Baltimore, Maryland 21205
and
ANCHOR MOTOR FREIGHT, INC.,
(For service of process,)
(Please serve:)
RESIDENT AGENT,
CORPORATION TRUST, INCORPORATED
First Maryland Building
25 S. Charles Street
Baltimore, Maryland 21202

Defendants

CIVIL ACTION NO._____

COMPLAINT
PRAYER FOR A JURY TRIAL
JURISDICTIONAL STATEMENT

This Court has jurisdiction under Title 29, USCA 185, 29, USC 301, 29 USCA 411.

Venue is laid in this District because the Defendant, Local Union Number 557, of the Defendant, International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, otherwise known as Freight Drivers and Helpers, represents employees for collective bargaining in the Baltimore, Maryland, area, and maintains its offices at 6000 Erdman Avenue, Baltimore, Maryland 21205; the Defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is the International Union, and regularly negotiates contracts on behalf of all of its local unions, including the Defendant, Local Union 557, and regularly enters into such collective bargaining agreements as parties thereto,

including, but not limited to, the representation of its members pursuant to Grievance Procedures set forth in its Contract, to which all of the parties to this action are bound, through and by its servant, agent and/or employee, Arthur C. Morningstar, Jr., business representative of Local 557; and that the aforesaid Arthur C. Morningstar, Jr., is regularly employed as an officer of Local 557 within the Baltimore area for the purpose of representing individual union members, including, but not limited to, the Plaintiff to this action.

The Defendant corporation, Anchor Motor Freight, Inc., is a lawful corporation under the laws of the State of Delaware, but maintains and operates a freight and/or car hauling business on Broening Highway and Cardiff Avenue located in Baltimore, Maryland, at which place the aforesaid corporation regularly does

business in the City of Baltimore, State of Maryland.

The Plaintiff, Philip Del Costello, is a citizen and resident of the State of Maryland, and from 1973 to June 27, 1977, and/or July 19, 1977, was an employee of the aforementioned Defendant, Anchor Motor Freight, Inc., at Broening Highway and Cardiff Avenue, in the capacity of a full time truck driver, and was and is a member of the Defendant, Local 557, as well as a member of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America (the International) from 1973 up to and including the present time, and as of the date of his discharge, as aforesaid, was in the bargaining unit covered by the collective bargaining agreement otherwise known as "The National Master Automobile Transporters Agreement", a copy of which is attached hereto and made a part hereof, and marked Plaintiff's

Exhibit No. 1.

That the aforesaid collective bargaining agreement was and is binding amongst and between all of the Defendants, and each of them, and the Plaintiff has been represented in the collective bargaining negotiations and in grievance and arbitration proceedings by the Defendant, International Union, through its Local Union 557, and more particularly, through and by its local business representative of Local 557, Arthur C. Morningstar, Jr.

This suit is brought by the Plaintiff, a former employee of the Defendant corporation, and a member of both local and the international union Defendants, all of the Defendants and each of them are parties to and bound by the aforementioned collective bargaining agreement (otherwise referred to as Plaintiff's Exhibit No.), for the purpose of reinstatement to his former position as an over-the-road truck driver

of the Defendant Company and for damages occasioned by the termination of his employment resulting from the Union's breach of their duty of fair representation, and the Company's contractual violation of the collective bargaining agreement, and the Company's and Union's intentional conspiracy to interfere with and remove the Plaintiff from his job and livelihood without cause, and for numerous violations of his contract and other rights.

That the amount in controversy, exclusive of interest and costs, exceeds Ten Thousand Dollars ($10,000).

COUNT ONE

1. That from 1973 to June 27, 1977, the Plaintiff, Philip Del Costello, as previously alleged, was a full time employee of the Anchor Motor Freight, Inc., which was and is engaged in the business of hauling automobiles and freight from Baltimore City to numerous

areas of the country, including, but not limited to, Canada.

2. That during the entire course of his employment with Anchor Motor Freight, Inc., hereinafter referred to as the "Company", the Plaintiff performed his duties in an exemplary and/or satisfactory manner.

3. More particularly, the duties that the Plaintiff was required to perform immediately pertinent to this cause of action included, but were not limited to, the following:

After reporting for work at the Baltimore terminal on Broening Highway and Cardiff Avenue, it was and is the practice of the Company to assign to the Plaintiff a particular tractor-trailer truck, together with requisite documents, for the purpose of transporting a given number of automobiles to a destination within and/or beyond the State of Maryland. After receiving the aforementioned assignment,

it was the obligation of the driver to whom the tractor-trailer truck was given for the above stated purpose to conduct a "pre-trip inspection" of the tractor-trailer truck for the purpose of determining whether or not the aforesaid truck and its equipment was sufficiently safe to make the assigned trip in accordance with numerous Department of Transportation regulations, other State and Federal laws and other safety standards, including, but but not limited to, Article 43 of the National Master Automobile Transporters Agreement, otherwise known as Plaintiff's Exhibit No. 1, which in pertinent part provides:

> "The employer shall not require any of its employees to operate vehicles not equipped with safety appliances required by law, or any vehicle not in safe operating condition. It shall be the employers responsibility to see that all safety equipment is checked and the driver shall also be responsible for checking safety equipment before leaving on trips... ... ."

Article 43, Section 2A, provided in pertinent part:

> "All employees shall report as soon as possible to the employer in writing all defects in equipment .... ."

Article 43, Section 2B, provides in pertinent part:

> "All equipment which is refused because not mechanically sound or properly equipped as required by law, shall be appropriately tagged so that it cannot be used by any other driver until the maintenance department has adjusted the complaint. In the event that equipment is shopped for repairs, the work order shall automatically be made available for inspection to the driver assigned to that equipment upon request of said driver."

Article 43, Section 3, sub-heading, "Vehicle Reports":

> "Written reports by an employee of a vehicle not being in safe operating condition shall receive prompt attention; otherwise, such employees may appeal directly to the Union in the form of a complaint."

4. For purposes of complying with the

above quoted sections of Article 43, the Company, by established custom and usage, permitted the driver during the course of the pre-trip inspection discretion to determine preliminarily whether or not the truck assigned should be "shopped" for defects and/or defective equipment revealed by the driver's inspection which the driver reasonably believes renders the truck unsafe to drive. If the pre-trip inspection by the driver disclosed the aforementioned defects which he deemed unsafe, the driver was required to list those defects which he observed on a document called a "Dock Repair Order". The driver was required to submit the Dock Repair Order to the foreman of the repair and/or maintenance shop at which time the truck would be "shopped", that is, the truck would be brought into the maintenance and repair shop for the purpose of determining the kind and type of repairs, if any, necessary to render

the truck safe for the purpose of making the trip.

5. Thereafter, the Dock Repair Order would be reviewed by the foreman and thereafter would be given to the maintenance crew under his direction and control, at which time the foreman had the authority, based upon his own observations and the observations of the maintenance crew, to decide which of the defects delineated in the Dock Repair Order required repairs, and the kind and type of measures and corrections that would be necessary to render the tractor-trailer safe for the purpose of making the aforementioned trip.

6. Thereafter, those repairs deemed necessary, as aforesaid, would be made, after which the member and/or members of the mainten ance department making the repairs would be permitted to make the appropriate notation on the "Dock Order" as to those repairs which in

fact were performed. Custom, usage and practice further established that if the defects noted on the Dock Order or independently revealed by the inspection of the foreman or the maintenance crew were of such a nature that repair of the aforementioned truck would take more than several hours, the truck would be retained by the maintenance department, and the driver would be authorized to request another truck for the purpose of making the assigned trip.

7. That on or about June 27, 197[illegible], the Plaintiff, Philip Del Costello, reported to work at the Company's Baltimore location at approximately 10:00 a.m., at which time the Company assigned to him a Bankhead tractor-trailer truck weighing approximately 38,000 pounds which he was required to load with new cars, and thereafter transport those cars from Baltimore, Maryland, to Montreal, Canada, and

thereafter return from Montreal, Canada, with another load of cars back to Washington, D.C., with the same truck.

8. In accordance with all of the aforementioned regularions, tractor provisions, standards, customs and usages regarding safety as aforesaid, the Plaintiff conducted a pre-trip inspection of the aforesaid truck, which revealed numerous defective conditions requiring repair which he recorded on a "Dock Repair Order", after which the Plaintiff brought the truck into the maintenance department and delivered the Dock Repair Order to the shop foreman.

9. Thereafter, the shop foreman, contrary to usual customs and practices established, took possession of the Dock Repair Order given him by the Plaintiff, and thereafter directed some of the maintenance crew members to make some, but not all, of the necessary repairs. Those members of the maintenance crew

directed to make the aforementioned repairs by the shop foreman were not given a copy of the Dock Repair Order, and for that reason did not make any notations on this Order as to those major repairs which one or more of the members of the maintenance crew were directed to perform. The foreman was advised that the kind and type of repair that was performed was inadequate and rendered the tractor-trailer truck unsafe for the purpose of being driven over the road and/or hauling cars. The numerous defects listed on the Dock Repair Order were never repaired or observed by the maintenance crew because of the shop foreman's refusal to point them out to the maintenance crew and/or permit them to correct the same, as a result of which the aforementioned truck was unsafe.

10. That several hours after the truck had been shopped, as aforesaid, the Plaintiff returned to the shop and was told by the foreman,

"The truck is ready", to which the Plaintiff made another inspection of the truck and noted numerous and substantial defects which rendered the truck unsafe and inherently dangerous.

11. That immediately thereafter the Plaintiff pointed out these defects to the member and/or members of the maintenance crew who performed the same, and was told by the individual mechanic and/or mechanics that the foreman did not provide them with a copy of the Dock Repair Order, but ordered them to make designated repairs which they considered insufficient, and rendered the truck unsafe for the public, the driver and the cars that were to be transported. The Plaintiff was further advised by the person and/or persons performing the work under the direction of the shop foreman that the necessary repairs required to render the truck safe were "vetoed" by the foreman because it would "take too much time".

12. Thereafter, the Plaintiff apprised the Company through its servants, agents and/or employees that he respectfully declined to load and/or drive the aforementioned truck because it exposed the Plaintiff personally and the public generally to grave and inherent danger. That the Company, through its servants, agents and/or employees, thereafter ordered the Plaintiff to drive the truck and advised him that his failure to do so would be regarded as voluntarily quitting by the Company. The Plaintiff responded to the servants, agents and/or employees of the Company by again pointing out the defects which had not been properly repaired and politely requested that the Defendant provide him with another tractor-trailer truck for the purpose of making the trip. That the Company summarily denied this request, after which he was ejected from the premises by the servants, agents and/or employees of the Company.

13. That the Plaintiff contacted Arthur Morningstar, Jr., business agent of the Defendant, Local 557 of the Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and advised him of the termination of his employment by the Defendant Company, and the events resulting in termination.

14. That within the next several days or week the Defendant Union, through its representative, Arthur Morningstar, Jr., briefly met with the Plaintiff and representatives of the Defendant Company at an informal conference, at which time the Company refused to discuss or hear the Plaintiff's reasons for refusing to operate the aforesaid truck, but engaged in name calling and summarily insisted that the Plaintiff's employment was terminated.

15. That the aforementioned Arthur C. Morningstar, Jr., by letter of July 5, 1977, a copy of which is attached hereto and made a

part hereof, and marked Plaintiff's Exhibit No. 2, advised the Defendant Company that there was a disagreement with the discharge of the Plaintiff and pursuant to Article 7 of the Plaintiff's Exhibit No. 1, a hearing would be held on July 19, 1977, for the purpose of hearing the merits of the discharge.

16. That the Plaintiff appeared at such hearing together with the Defendant Union and/or Local 557, who represented the aforementioned Plaintiff in a discriminatory, arbitrary and perfunctory manner as more particularly set forth in Count Two of this Complaint, as a result of which the Eastern Conference by formal decision on July 19, 1977, a copy of which is attached hereto and made a part hereof and marked Plaintiff's Exhibit No. 3, ruled in favor of the Company and in substance decided that the Plaintiff voluntarily quit.

17. That the Plaintiff has exhausted

all of his internal remedies.

18. That notwithstanding, the decision of the Eastern Conference Automobile Transporters Joint Committee decision, the termination of the Plaintiff by the Defendant Company on June 27, 1977, constituted a violation of his contractual rights as aforesaid, as prescribed by Article 43 of Plaintiff's Exhibit No. 1, otherwise prescribed by Federal Motor Carriers Safety Regulations promulgated by the United States Laws and safety standards.

19. That the employment of the Plaintiff was intentionally and maliciously terminated by the Defendant Company because of the Plaintiff's past activity at the Company and within the Union against unsafe equipment, unsafe tractor-trailer trucks and equipment owned, operated and controlled by the aforesaid Corporate Defendant.

20. That by reason of the Plaintiff's

unlawful discharge, he sustained lost time and/or money from his employment as a professional truck driver, severe emotional distress, embarrassment and anxiety, and loss of other benefits incident to his employment contract as a professional truck driver.

Therefore, this suit is brought and the Plaintiff claims:

a. Two Hundred and Fifty Thousand ($250,000) Dollars in compensatory damages.

b. One Million ($1,000,000) Dollars in punitive damages.

c. Reasonable attorney's fees and costs.

d. The Plaintiff further requested, by way of relief, that this Court pass an Order reinstating him as a full time truck driver as of the date of his discharge with back pay together with all of the rights and benefits to which he was and is and would be entitled.

e. That he be granted such other and further relief as justice requires.

COUNT TWO

21. That the Plaintiff alleges and realleges all of the allegations contained in Count One and incorporates the same into this Count as fully pleaded herein, and further alleges that a hearing was scheduled and held on July 19, 1977, before the Eastern Conference Automobile Transporters Joint Committee pursuant to Article 7 and Article 39 of the National Masters Automobile Transporters Agreement, which was and is composed of three representatives of management, which had power by majority vote to decide whether or not the Plaintiff voluntarily quit, or was otherwise justified by reason of the Company's failure to maintain his tractor-trailer in a safe condition pursuant to Article 43 of the aforementioned collective bargaining agreement, referred to as Plaintiff's

Exhibit No. 1, as well as the laws, standards, rules and regulations, customs and usages governing safety and thereby retain his job.

22. That the decision by the majority of the panel pursuant to and in accordance with Article 7 as aforesaid, was and is final, binding and conclusive upon the Union, the Company and the Plaintiff, with no right of further appeal except in cases of a deadlock. That under the terms of the aforementioned collective bargaining agreement (Exhibit 1), the Union by and through Arthur C. Morningstar, Jr., was the exclusive representative of the Plaintiff.

23. That the aforesaid International Union and its Local 557 through and by its servant, agent and/or employee, business representative, Arthur C. Morningstar, Jr., breached its duty of fair representation to the Plaintiff in that the said Arthur C.

Morningstar, Jr., after being apprised of the specific and detailed account of the numerous defects and dangerous conditions of the aforementioned tractor-trailer truck on or about June 28, 1977, up to and including the date of the hearing before the Joint Committee on July 19, 1977, made absolutely no independent investigation of the truck which was available at the time, and that the aforementioned business representative, after being given the names of the mechanics who observed the aforementioned defects and dangerous conditions subsequent to making repairs which they knew were inadequate under the direction of representatives of the Company, to whom they expressed the fact that the aforementioned defects rendered the truck unsafe, were never interviewed, were never called as witnesses, and were never requested to provide statements and/or affidavits for submission to the Joint Committee in

circumstances where the aforementioned mechanics, all of whom were Union members of Local 557, were ready, able and willing to submit such evidence and cooperate.

24. Moreover, the aforementioned mechanics possessed the expertise to apprise the Committee that the aforementioned tractor-trailer truck was unsafe at the time that the Company directed the Plaintiff to load the truck and commence the trip.

25. That the Plaintiff had requested said Arthur C. Morningstar, Jr., to make this investigation and to interview the mechanics with respect to the condition of the truck, and thereafter request them to appear at the hearing for purposes of testifying on behalf of the Plaintiff, but the said Arthur C. Morningstar, Jr., advised the Plaintiff that such investigation was unnecessary and that interview and production of these witnesses

were unnecessary, and introduction of their statements were similarly unnecessary.

26. That the aforementioned Arthur C. Morningstar, Jr., in fact lacked knowledge and/or expert knowledge about tractor-trailer trucks sufficient to enable him to intelligently represent the Plaintiff at the aforementioned arbitration hearing.

27. That the aforementioned Arthur C. Morningstar, Jr., met with the Plaintiff for approximately fifteen minutes or less on the day before the hearing and/or the date of the hearing, and he conducted no interview concerning the subject matter of the controversy, but generally apprised the Plaintiff of some of the procedures pertinent to the hearing, and again assured the Plaintiff he was "going to win", without the necessity of going into extensive and/or exhaustive and/or adequate detail with respect to the specific allegations

of unsafety.

28. Thereafter, Arthur C. Morningstar, Jr., conducted absolutely no cross-examination, and turned to the Plaintiff and said, "Tell your story."

29. That the hearing was held on July 19, 1977, as aforesaid, at which time the Company presented through second and third hand hearsay evidence as well as false statements made by the Company witnesses who were represented by counsel for the Company.

30. That the entire hearing lasted one hour in circumstances which required a presentation of evidence which required extensive testimony which would and should have taken substantial time in order that the panel be apprised of sufficient facts and information in order to enable them to reach a fair, rational and just decision.

31. That Arthur C. Morningstar, Jr., had the opportunity to produce the truck at the hearing for purposes of examination by the panel, and that he failed to do so and/or, alternatively, failed to request the Company to do so. That no transcript of the proceedings was taken of the testimony adduced at the hearing.

32. That when the Plaintiff requested the said Arthur C. Morningstar, Jr., to conduct an investigation by examining the truck, interviewing witnesses, he declined to do so on the ground that he was engaged in numerous other duties and involved in other Union matters which did not afford him sufficient time to conduct an investigation as requested, and to interview those witnesses whose testimony and expert knowledge was crucial to the Plaintiff's cause, but responded by telling the Plaintiff, "Don't worry, everything will be okay, we are

going to win."

33. That the Plaintiff was afforded token, inadequate and perfunctory representation by the aforesaid Defendant Union, and their action through and by their servant, agent and/or employee, Arthur C. Morningstar, Jr., was arbitrary, discriminatory, hostile to the Plaintiff, before, during and throughout the entire grievance and arbitration procedures, which resulted in an abrupt hearing in violation of the Plaintiff's rights to substantive and procedural due process of law, and that the aforementioned acts of omission and commission by the aforementioned Defendant Union, and more particularly its agent, Arthur C. Morningstar, Jr., constituted a breach of the duty of fair representation owed by them to the Plaintiff, by Arthur C. Morningstar, Jr., and that on August 19, 1977, by letter of Arthur C. Morningstar, Jr., which is attached hereto,

made a part hereof and marked Plaintiff's Exhibit No. 4, the Plaintiff was apprised of the alleged basis for the decision of the Arbitration Committee, and he had until September 20, 1977, to make additions, deletions or corrections in writing regarding the decision rendered, and the Plaintiff by letter of September 14, 1977, a copy of which is attached hereto and made a part hereof and marked Plaintiff's Exhibit No. 5, in some detail states the reasons and facts in support of his contention that the representation of the Defendant Union was unfair, and similarly related that the facts supported his contention that the decision of the arbitration committee was also unfair and in error.

34. That the Defendant Union's actions constituted a breach of the duty of fair representation owed by them to the Plaintiff, and that their actions were intentionally and

maliciously calculated to have the Plaintiff discharged from the Company.

That as a result of this breach of the Union's duty of fair representation to the Plaintiff, the Plaintiff suffered emotional distress and anguish, was terminated from his employment as aforesaid, lost substantial monies as a result of his discharge together with all fringe benefits that would have accrued to him as a full time truck driver for the aforesaid Company.

Wherefore, the Plaintiff claims:

a. Two Hundred and Fifty Thousand ($250,000) Dollars in compensatory damages.

b. One Million ($1,000,000) Dollars in punitive damages.

c. Reasonable Attorney's fees and costs.

COUNT THREE

35. The Plaintiff alleges and realleges

all of the allegations and facts contained in Counts One and Two of this Complaint, and incorporates the same by reference into this Count as if fully pleaded herein, and further alleges that the Defendants conspired and colluded to have the Plaintiff discharged by the Company on June 27, 1977 and/or July 19, 1977, by falsely claiming and/or acquiescing in and to the false and fraudulent claim that the Plaintiff had intentionally quit by his refusal to operate and load and drive the aforementioned tractor-trailer truck which was in an unsafe condition.

36. That the Defendants' actions were intentional and malicious, and calculated to deprive the Plaintiff of his job as a full time over-the-road truck driver for Anchor Motor Freight, Inc., and as a reuslt of the Defendants' conspiracy the Plaintiff suffered substantial emotional distress and anxiety; that

he lost and is losing substantial wages due to his unlawful discharge together with fringe benefits to which he would be entitled.

Wherefore, the Plaintiff brings this action and claims:

a. Two Hundred and Fifty Thousand ($250,000) Dollars in compensatory damages.

b. One Million ($1,000,000) Dollars in punitive damages.

c. Counsel fees and costs.

d. In addition, the Plaintiff respectfully requests that this Court pass an Order compelling the Defendant, Anchor Motor Freight, Inc., to restore him to the status of a full time over-the-road truck driver as of June 27, 1977, together with back pay and all of the rights, benefits, and privileges to which he would have been entitled in the absence of his wrongful termination.

e. That this Court grant such other

and further relief as justice requires.

/s/

WILLIAM H. ZINMAN
215 Tower Building
222 E. Baltimore Street
Baltimore, Maryland 21202
727-6151
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILIP DEL COSTELLO *
Plaintiff

vs. *

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS CIVIL ACTION
OF AMERICA *
and NO. H-78-436
FREIGHT DRIVERS AND HELPERS,
LOCAL 557
and *
ANCHOR MOTOR FREIGHT, INC.
Defendants

*

****

ANSWER OF FREIGHT DRIVERS
AND HELPERS, LOCAL 557

Freight Drivers and Helpers, Local 557, Defendant, by Bernard W. Rubenstein, Carl S. Yaller, and Edelman, Levy and Rubenstein, P.A., for an Answer to the Complaint, say:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief can be granted pursuant to 29 USC §411, in that it fails to allege any violation of that statute.

THIRD DEFENSE

The Complaint fails to state a claim upon which relief may be granted, since Plaintiff has failed to fully exhaust all internal remedies within this Defendant.

FOURTH DEFENSE

This action is barred by the doctrines of: (1) collateral estoppel; (2) arbitration and award; and (3) settlement and satisfaction.

FIFTH DEFENSE

Specifically responding to the allegations contained in the Complaint, and subject to and without waiving the foregoing defenses, this Defendant further says:

JURISDICTION STATEMENT

This Defendant denies the following allegations contained within the Jurisdictional Statement:

(a) That this Court enjoys jurisdiction pursuant to 29 USC, §301 or §411.

(b) That Arthur C. Morningstar is an agent of Defendant International Union.

(c) That Plaintiff was ever discharged by Defendant Anchor Motor Freight, Inc. (Anchor).

(d) That the applicable collective bargaining agreement is binding between this Defendant and the International Union.

(e) That this Defendant breached a duty of fair representation towards Plaintiff.

(f) That the Defendant Anchor breached the collective bargaining agreement.

(g) That any defendants conspired to violate any contractual or other rights of Plaintiff.

(h) That the amount in controversy exceeds Ten Thousand Dollars.

All other allegations contained within

the Jurisdictional Statement of the Complaint are admitted.

COUNT ONE

1. Admitted.

2. Denied.

3. The allegations contained within Paragraph 3 are admitted; however, this Defendant avers that no underlining is contained in the quoted language.

4. Admitted.

5. Admitted.

6. Concerning the allegations contained within Paragraph 6, this Defendant avers that it is the decision of Defendant Anchor to determine whether an employee shall pay during the course of these repairs, or whether the employee shall be issued an alternate vehicle. All other allegations of this Paragraph are admitted.

7. The allegations of Paragraph 7 are admitted; however, this Defendant avers that the designations mentioned in this Paragraph refer to general geographical locations, rather

than precise political boundaries.

8. Admitted.

9. Denied.

10. Denied.

11. This Defendant is without sufficient first-hand knowledge to admit or deny the allegations contained within Paragraph 11, and consequently they are denied.

12. This Defendant is without sufficient first-hand knowledge to admit or deny the allegations contained within the first and third sentences of Paragraph 12. The second sentence of Paragraph 12 is admitted. The fourth sentence of Paragraph 12 is denied.

13. Admitted.

14. The allegations of Paragraph 14 are admitted; however, this Defendant avers that all name-calling at said meeting was between Plaintiff and Defendant Anchor.

15. This Defendant denies ever having characterized the termination of Plaintiff as

a discharge. The remaining allegations of Paragraph 15 are admitted.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

Wherefore, the Plaintiff is entitled to no remedy pursuant to Count One.

COUNT TWO

21. That Defendant incorporates by reference its answers to Paragraphs 1-20, as though set forth fully herein. This Defendant denies that the hearing panel was composed as alleged; however, this Defendant admits all the remaining allegations contained within Paragraph 21.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

28. Concerning the allegations contained within Paragraph 28 of the Complaint, this Defendant denies that Arthur C. Morningstar, Jr., said "Tell your story." This Defendant admits that Arthur C. Morningstar, Jr., conducted no cross-examination, but avers that procedural rules forbid such cross-examination.

29. Denied.

30. Denied.

31. The allegations contained within the first sentence of Paragraph 31 are denied. The remaining allegations of Paragraph 31 are admitted.

32. Denied.

33. Denied.

34. Denied.

Wherefore, Plaintiff is entitled to no

remedy pursuant to Count Two.

COUNT THREE

35. This Defendant incorporates by reference its answers to Paragraphs 1-34, as though set forth fully herein. The allegations contained within Paragraph 35 are denied.

Wherefore, Plaintiff is entitled to no remedy pursuant to Count Three.

/s/
Bernard W. Rubenstein

/s/
Carl S. Yaller
Edelman, Levy and
Rubenstein
Suite 2400, Ten Light St.
Baltimore, Maryland
21202
752-6160
Attorneys for Defendant
Freight Drivers and
Helpers, Local 557

I HEREBY CERTIFY that copies of the aforegoing Answer, Motion and Memorandum were mailed, postage prepaid, this 10th day of April, 1978, to William H. Zinman, Esq., 215

Tower Bldg., 222 E. Baltimore Street, Baltimore, Maryland 21202; Bernard S. Goldfarb, Esq., Goldfarb & Reznick, 1825 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113.

/s/
Carl S. Yaller

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILIP DEL COSTELLO Plaintiff)	
vs.)	CIVIL ACTION NO. H-78-436
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN AND HELPERS OF AMERICA, et al. Defendants)	SEPARATE ANSWER OF DEFENDANT ANCHOR MOTOR FREIGHT, INC.

Now comes Defendant, Anchor Motor Freight, Inc. (Anchor), and answers the Complaint of the Plaintiff as follows:

JURISDICTIONAL STATEMENT OF COMPLAINT

1. Defendant denies the Plaintiff's claim that jurisdiction is within this Court.

2. Defendant is without knowledge of Plaintiff's allegations supporting venue in this Court and therefore denies each and every allegation in Plaintiff's Complaint relating thereto.

3. Defendant admits that it is a corporation incorporated under the laws of the

State of Delaware and that it has an office located at Broening Highway and Cardiff Avenue in Baltimore, Maryland.

4. Defendant is without knowledge relating to those references in Plaintiff's Complaint pertaining to Plaintiff's citizenship, residence, union membership, and employee status as alleged thereon, Therefore, Defendant denies each and every allegation in Plaintiff's Complaint relating thereto.

5. Defendant admits that it is a party to several collective bargaining agreements. Among them is the National Master Automobile Transporters Agreement and the Eastern Conference Area Truckaway, Driveaway, Yard and Shop Supplement (June 1, 1976 - May 31, 1979). However, Defendant denies the remaining allegations pertaining to the legal effect of said named agreement as alleged in Plaintiff's Complaint.

6. Defendant denies each and every allegation in the Complaint's Jurisdictional Statement not specifically admitted herein to be true.

FIRST COUNT

7. Defendant admits the allegations in Paragraph 1 of Plaintiff's Complaint.

8. Defendant denies the allegations in Paragraph 2 of Plaintiff's Complaint.

9. Defendant admits the allegations in Paragraph 3 of Plaintiff's Complaint, but denies the quoted statements are underlined.

10. Defendant denies the allegations in Paragraph 4 of Plaintiff's Complaint.

11. Defendant admits the allegations in Paragraph 5 of Plaintiff's Complaint, eliminating the usage of words "thereafter" and "would".

12. Defendant admits the allegations in Paragraph 6 of Plaintiff's Complaint.

13. Defendant admits the allegations in Paragraph 7 of Plaintiff's Complaint.

14. Defendant admits the allegations in Paragraph 8 of Plaintiff's Complaint.

15. Defendant denies the allegations in Paragraph 9 of Plaintiff's Complaint.

16. Defendant denies the allegations in Paragraph 10 of Plaintiff's Complaint.

17. Defendant denies the allegations in Paragraph 11 of Plaintiff's Complaint.

18. Defendant denies the allegations in Paragraph 12 of Plaintiff's Complaint, excepting that refusal to drive "the truck" amounts to "voluntarily quitting".

19. Defendant is without knowledge of the allegations in Paragraph 13 of Plaintiff's Complaint and therefore denies each and every allegation contained therein.

20. Defendant denies the allegations in Paragraph 14 of Plaintiff's Complaint, but

admits that a meeting took place.

21. Defendant admits the allegations in Paragraph 15 of Plaintiff's Complaint but denies that Plaintiff's termination was characterized as a "discharge".

22. Defendant denies the allegations in Paragraph 16 of Plaintiff's Complaint.

23. Defendant denies the allegations in Paragraph 17 of Plaintiff's Complaint.

24. Defendant denies the allegations in Paragraph 18 of Plaintiff's Complaint.

25. Defendant denies the allegations in Paragraph 19 of Plaintiff's Complaint.

26. Defendant denies the allegations in Paragraph 20 of Plaintiff's Complaint.

SECOND COUNT

27. Defendant denies the allegations in Paragraph 21 of Plaintiff's Complaint but admits the joint committee had "power" as alleged.

28. Defendant admits the allegations in Paragraph 22 of Plaintiff's Complaint but denies the reference to Arthur C. Morningstar, Jr., as being "exclusive".

29. Defendant denies the allegations in Paragraph 23 of Plaintiff's Complaint.

30. Defendant denies the allegations in Paragraph 24 of Plaintiff's Complaint.

31. Defendant is without knowledge of the allegations in Paragraph 25 of Plaintiff's Complaint and therefore denies each and every allegation contained therein.

32. Defendant denies the allegations of Paragraph 26 of Plaintiff's Complaint.

33. Defendant is without knowledge of the allegations in Paragraph 27 of Plaintiff's Complaint and therefore denies each and every allegation contained therein.

34. Defendant denies the allegations in Paragraph 28 of Plaintiff's Complaint and

further states that all procedural rules were complied with.

35. Defendant denies the allegations in Paragraph 29 of Plaintiff's Complaint.

36. Defendant denies the allegations in Paragraph 30 of Plaintiff's Complaint.

37. Defendant is without knowledge of the allegations in Paragraph 31 of Plaintiff's Complaint as to Arthur C. Morningstar, Jr., and therefore denies the same, and further states that a transcript is not required.

38. Defendant is without knowledge of the allegations in Paragraph 32 of Plaintiff's Complaint and therefore denies each and every allegation contained therein.

39. Defendant denies the allegations in Paragraph 33 of Plaintiff's Complaint.

40. Defendant denies the allegations in Paragraph 34 of Plaintiff's Complaint.

THIRD COUNT

41. Defendant denies the allegations in Paragraph 35 of Plaintiff's Complaint.

42. Defendant denies the allegations in Paragraph 36 of Plaintiff's Complaint.

43. Defendant denies each and every allegation in Plaintiff's Complaint not specifically admitted to be true.

AFFIRMATIVE DEFENSE ONE

44. In addition to the admissions and denials contained in the foregoing paragraphs, and realleged herein with equal force, Defendant Anchor states that the Plaintiff employed by Anchor was discharged for good and sufficient cause consistent with the pertinent labor agreement; that Local Union No. 557 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America was the collective bargaining agent for the Plaintiff and did bargain and represent the

Plaintiff and did process the grievance of the Plaintiff in a diligent and conscientious manner through the grievance machinery of the pertinent labor agreement, and that the Plaintiff did exhaust his rights through said contractual grievance machinery and that the arbitral process pursuant to the labor agreement did sustain the discharge as being consistent with the agreement and for good and sufficient cause and that the grievance machinery was given "full play".

AFFIRMATIVE DEFENSE TWO

45. For its second affirmative defense, Defendant Anchor states that the Plaintiff's Complaint has failed to state a claim upon which relief may be granted.

AFFIRMATIVE DEFENSE THREE

46. For its third affirmative defense, Defendant Anchor states that the Plaintiff's Complaint is barred by the applicable statute

of limitations.

AFFIRMATIVE DEFENSE FOUR

47. Defendant Anchor states for its fourth affirmative defense that the Plaintiff is barred by the doctrine of laches and estoppel.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant Anchor Motor Freight, Inc., prays that the Complaint be dismissed and that it may go hence with its costs, and for such other and further relief as the Court may deem just and equitable, including but not limited to reasonable attorney fees and costs.

April 18, 1978
Cleveland, Ohio

/s/
BERNARD S. GOLDFARB
MICHAEL A. POHL
Goldfarb & Reznick
1825 The Illuminating Bldg.
55 Public Square
Cleveland, Ohio 44113
(216) 781-0383

April 20, 1978
Baltimore, Maryland

ARNOLD M. WEINER, ESQUIRE
Melnicove, Kaufman & Weiner, P.A.
Charles Center South
36 S Charles Street
Baltimore, Maryland 21201
(301) 332-8533
Attorneys for Defendant Anchor Motor Freight, Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing Separate Answer of Defendant Anchor Motor Freight, Inc. was this 20th day of April, 1978, mailed by certified mail, return receipt requested to the following:

William H. Zinman, Esquire
Attorney for Plaintiff
215 Tower Building
222 E. Baltimore Street
Baltimore, Maryland 21202

International Brotherhood of Teamsters, Chauffeurs, and Warehousemen & Helpers of America
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

Bernard W. Rubenstein
Carl S. Yaller
Edelman, Levy & Rubenstein
Attorneys for Defendant
Freight Drivers and Helpers Local 557
Suite 2400, Ten Light Street
Baltimore, Maryland 21202

/s/
ARNOLD M. WEINER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILIP DEL COSTELLO Plaintiff	*	
vs	*	CIVIL ACTION
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and FREIGHT DRIVERS AND HELPERS LOCAL 557 and ANCHOR MOTOR FREIGHT, INC. Defendants	*	NO. H-78-436

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INTERROGATORIES

The Plaintiff, Philip Del Costello, by his attorney, William H. Zinman, propounds the following Interrogatories to be answered under oath by the Defendant, Freight Drivers and Helpers Local 557.

a. These Interrogatories are continuing in character so as to require supplemental answers to these interrogatories of the

Defendant obtains further or different information before trial.

b. Where the name or identity of the person is requested, state his or her full name, home address and also business address.

c. Unless otherwise indicated, these interrogatories refer to the time, place and circumstances of the occurrence mentioned or complained of in the pleadings.

d. Where knowledge or information or possession of a party is required, such request includes knowledge of the party's agents, representatives and, unless otherwise privileged, by his attorney.

e. When an answer is made by a corporate defendant or an organization or association, state the name, address and title of the person supplying the information.

f. "Document", whenever used in these interrogatories, means:

1. An item in writing, including by way of example, and not in limitation, notes, correspondence, memoranda, instruments, drafts, surveys, reports, invoices, receipts, bills, ledgers, minutes, transcripts, statements (whether or not signed by the party making the same).

2. Any tape, record or other electro-mechanical means of recording or storing voices or data.

3. Any photograph, movie, slide, chart, graph, plat, drawing or other visual representation of data.

g. The word "describe" or "description" whenever used in these interrogatories means, to give the date, subject matter, title or recording reference, and the name, title, business and home addresses of the parties to the item to be described, including the person preparing, recording and

photographing the item.

h. If additional space is needed to answer any of these interrogatories other than the space allowed on the page for the answer, add additional pages for the same.

16. On July 19, 1977, at the Eastern Conference Automobile Transporters Joint Committee did the Company (Anchor Motor Freight), the International (International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) and/or Local 557 (International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America) produce any written or oral statements of persons not present. If the answer is yes, please state:

Answer 16. No.

a. The names of the persons whose statements were introduced.

b. The exact substance of the

written or oral statements that were introduced.

/s/
WILLIAM H. ZINMAN
215 Tower Building
222 E. Baltimore Street
Baltimore, Maryland
21202
727-6151
Attorney for Plaintiff

It is certified this 3 day of July, 1978, that a copy of the aforegoing Interrogatories were mailed to Bernard W. Rubenstein, Esquire, Carl S. Yaller, Esquire, Suite 2400, Ten Light Street, Baltimore, Maryland 21202, attorneys for Defendant, Freight Drivers and Helpers, Local 557, and Arnold M. Weiner, Esq., 36 S. Charles Street, Baltimore, Maryland 21201, Attorney for Defendant, Anchor Motor Freight, Inc., and Robert M. Baptiste, Esq., Roland P. Wilder, Jr., Esq., 25 Louisiana Ave., N.W., Washington, D.C. 20001, Attorneys

for Defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Anthong Abato, Esquire, Maryland Executive Park, 311 Chester Building, 8600 Lasalle Road, Towson, Maryland 21204, Attorney for International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

/s/
WILLIAM H. ZINMAN

I HEREBY CERTIFY that on this 12th day of September, 1978, a copy of the aforegoing Answers to Interrogatories was mailed, postage prepaid, to William H. Zinman, Esq., 215 Tower Building, 222 East Baltimore Street, Baltimore, Maryland 21202, Arnold M. Weiner, Esq., 36 South Charles Street, Baltimore, Maryland 21201, Robert M. Baptiste, Esq., Roland F. Wilder, Jr., Esq., 25 Louisiana Avenue, N.W., Washington, D.C. 20001, and Anthony Abato, Esq., Maryland Executive Park, 311 Chester Building, 8600 Lasalle Road, Towson, Maryland 21204.

/s/
CARL S. YALLER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILIP DEL COSTELLO *
Plaintiff

vs. *

CIVIL ACTION

NO. J-78-436

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, *
WAREHOUSEMEN AND HELPERS
OF AMERICA, et al.
Defendants *

****

AFFIDAVIT

I, Philip Del Costello, being duly sworn, deposes and states the following:

1. The Affiant makes this Affidavit from his own personal knowledge.

2. The Affiant presently resides at 2204 Perry Ave., Edgewood, Maryland.

3. The Affiant was formerly a driver for Anchor Motor Freight, and is the Plaintiff in the above entitled case.

On July 19, 1977, the Eastern Conference held a hearing in Atlantic City, New

Jersey, for the purpose of deciding whether or not I was properly discharged by Anchor Motor Freight on June 27, 1977.

At the time I was represented by a Business Agent of Local 557, Arthur Morningstar. Anchor Motor Freight was represented by Daniel Sandy.

Several days after the hearing, I received the Decision of the Eastern Conference upholding my discharge. On August 20, 1977, I received a letter from Arthur Morningstar in which he enclosed the minutes of the conference and advised me that I had until September 20, 1977, to make any additions, deletions or corrections, and otherwise the minutes would be approved by the Conference on that date. (Copies of the September 20, 1977, correspondence from Morningstar together with minutes are attached to this Affidavit and are also in evidence in the Del Costello deposition taken

by Anchor.) When I received this letter from Morningstar, I believed that there was a possibility that the Conference might reconsider its Decision, even though the Decision appeared to be final and binding. Otherwise, I thought there would be no need for the minutes to be corrected. I was not aware of the rules and procedures of the Conference, because I had never appeared before the Conference prior to July 19, 1977, to answer any disciplinary or other charges during the entire time that I was working for Anchor from 1973 to 1977.

When I called Morningstar and asked him to help me prepare this deletions and corrections letter, he refused such help and told me to "go to Prod", my "Communist friends in Washington" for help. Because of Morningstar's hostile attitude and his inadequate handling of my entire case, I contacted my attorney, Claude McKenzie, who had previously represented

me in a Workmen's Compensation case, and asked him if he believed anything could be done to restore my job. Mr. McKenzie advised me that he could not handle this type of case, and that it was very difficult for any lawyer who was not a specialist in Labor Law to take such a case. I then asked if he could find an attorney specializing in Labor Law who could represent me. About a week later I contacted William H. Zinman, my present counsel, asking him to take my case. Mr. Zinman at that time declined to represent me because at that time he did not know whether I had a case. I then showed Mr. Zinman Morningstar's letter and asked him for advice and counsel about my answer, which was due by September 20, 1977. He gave me certain advice concerning how I should answer, and the next day, September 14, 1977, I forwarded my answer to Duke O'Connor, President of Local 557, and

sent a copy to Arthur Morningstar. (A copy of this letter is attached to this Affidavit, and is also attached to Anchor's deposition of Del Costello). I had reason to believe that my letter would be answered and that it was possible that the Eastern Conference would give me another hearing and reconsider their Decision. However, I never received any reply from Morningstar, Duke O'Connor or the Eastern Conference.

At a Union meeting in late December, 1977, I asked Morningstar when I was going to receive an answer to my September 14 letter and he told me, "You got your answer." I replied, "What do you mean?", and he said, "That is your answer." By that I assumed that he meant that nothing would be or could be done by either him or the Eastern Conference. I then returned to Mr. Zinman, asking him if he would take my case, and he agreed

to do so after he had an opportunity to investigate the facts and do some research in the area of Labor Law, which he started in the last week of December and completed in the middle of February, 1978. Before he filed suit on March 16, 1978, I signed a Retainer Agreement on March 9, 1978, at the time that our personal arrangements were made.

I hereby swear and affirm that all of the above mentioned statements are made on the basis of my own personal knowledge, and I am competent to testify to the matters stated herein, which is exactly the same statement signed and made by me on May 17, 1981.

Signed this 22 day of July, 1981.

/s/
PHILIP DEL COSTELLO

Affiliations: Teamsters Joint Council No. 62
Eastern Conference of Teamsters

6000 Erdman Avenue, Baltimore, Maryland 21205
Phone: 301-485-9200

FREIGHT DRIVERS & HELPERS
UNION NO. 557
Affiliated with the
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA

August 19, 1977

Mr. Philip Del Costello
2204 Perry Avenue
Edgewood, Maryland 21040

EXHIBIT A

Dear Sir and Brother:

The enclosed minutes will be approved at the September 20th meeting of the Eastern Conference Joint Area Committee. If you have any additions, deletions or corrections, please put them in writing and send to me immediately.

Failure to do so, I will submit the minutes as being approved.

Fraternally yours,
/s/
Arthur C. Morningstar, Jr.
Business Representative

ACM/erb
Certified Mail
#568704 - R.R.R.
Enclosure

"INSIST ON ALL UNION DELIVERIES"

Chairman Hunter called for Case 3196:

Local 557 v. Anchor Motor Freight, Inc.
Union alleges unjust discharge of P.Del Costello; requests reinstatement with full seniority and reimbursement of all lost earnings.

Union Panel: M. Robilotto, M. Moyers, A. Hathaway, J. Arnita
Company Panel: I. Hunter, J. Montague, B. Bryan, R. Doerfier

Deniel Sandy, after introducing Elwood Feldman, Maintenance Superintendent at the Baltimore Terminal, presented the case for the Company. On June 27, 1977, Mr. Del Costello was dispatched to Albany, N.Y., with a return from St. Therese to Alexandria, Virginia. He had a 1976 tractor with 37,000 miles on it and he found several items wrong with the rig. He was in the shop with it for 3-1/2 hours, where all safety items were repaired. After the repair was finished, Mr. Del Costello asked to see the repair sheet. He checked the trailer and said he would not take it until certain items were taken care of. He was

discharged for refusing to take the truck as it had been fixed. He refused to leave the Company property so the police were called and he was escorted off. He is a very arrogant individual, working only when he wants to work. The Company introduced work records for the months of May and June.

The panel, in executive session, motion made, seconded and carried, that the work record history was relevant, but asked the Company to leave the logs so that the Committee might use them in executive session.

A. Morningstar, for Local 557, said that in the local level hearing these logs were not discussed.

Mr. Sandy said that the purpose of this evidence was to show that the grievant did not want to drive but would use every excuse to keep his rig in the shop. The records showed how he logged so that the equipment was in the

shop so much. On the 20th of June he spent 9-1/4 hours in the yard and never did get out. The piece of equipment which Mr. Del Costello refused to take out another driver did take it and delivered the load. This man has availed himself with the NLRB in a case which is pending. Since March of 1973 he has been reprimanded 70 times; discharged and suspended numerous times. He voluntarily quit when he refused to take this truck on the day in question.

Mr. Morningstar introduced his colleague from Local 557: Patrick O'Connor; Tom Sharman, the shop steward; and the grievant, P. Del Costello. Mr. Morningstar said that the grievant reported on June 27, 1977 and, in accordance with notices put out by the Company, he did properly inspect his truck. He also did shop his truck and lists were distributed showing what was needed and what was done.

Mr. Del Costello, in his own behalf, read the following report:

"On June 27, 1977, while inspecting the truck assigned to me, the Operation Superintendent, Jim Gasper, harrassed me by devoting special attention to question me for every part I found broken or worn out. After I inspected the tractor and trailer, the Terminal Manager, Rich Durand, the Superintendent for Fleet Maintenance, Mr. Omerline, and Jim Gasper used my list and inspected the truck again, and told me what they would repair and would not repair. I shopped the truck by reporting in writing on the front and back of the tractor and trailer repair card "all" the parts broken or worn out. Mr. Omerline, the Fleet Maintenance Superintendent, put a check mark by the repair he felt was needed.

The Shop Foreman did not give the work order to the welder and told the welder to

weld a couple broken parts. The welder, Tony, asked Mr. Nelson for the work order and Mr. Nelson told Tony, "Just fix what I told you." Tony did repair everything Mr. Nelson pointed out. Tony did not release the work order. He did not receive the work order. Russ, the mechanic, did get the work order and Mr.Nelson Russ, fix the parts with a check by it and don't do the rest." Russ did what he was told and did not release the work order. The Shop Foreman then called me and told me the truck was repaired.

This new breed of problems the Terminal Manager and his assistants are creating cause confusion and take away our rights to work by the safety laws. This is not only unconstitutional but against the law.

These trucks were built with safety features. When the safety features that guard against accidents break, the company refuses

to replace or repair them. Every load is different and every mechanical problem happens a different way to different people (and sometimes the same way to different people) and this safety feature guards against accidents that can happen and do happen every day at Anchor Motor Freight. These accidents injure the drivers and other employees slightly and seriously. Among other drivers, I am an example of the accidental injuries that could have been prevented. On one occasion, I requested for repair on a truck and the Terminal Manager, Safety Supervisor, Shop Superintendent, Cargo Damage Safety Supervisor, Shop Foreman - all of these important executives - looked at the parts I requested to be repaired and all of them told me the part did not need to be repaired. I went to the hospital with an injury from the part I had requested to be replaced and wasn't replaced."

Signed - Philip Del Costello.

Mr. Morningstar introduced pictures taken of the rig in question, to which the Company objected. The truck had been taken out of the shop on the 29th and dispatched with a load.

The panel in executive session, motion made, seconded and carried, that the pictures would be taken under advisement in executive session in the same manner as the logs introduced by the Company.

Mr. Morningstar said that Mr. Del Costello did not ask the Company to call the police; he did request another truck and they would not give it to him. He refused to take the truck in question out because it was unsafe.

Mr. Del Costello said that only two times had he been caught out on the road and both times it was because recapped tires came

apart.

Mr. Morningstar said that this man had every right to refuse this truck. The pictures indicate that it had not been fixed. Also, much of the equipment at the Baltimore Terminal is bad. The Company is trying to get it fixed but safety for the cargo is being stressed while the driver is being ignored. The Local Union feels that this man is being set up for objecting to poor equipment.

Chairman Hunter said that he wanted it clearly understood that consideration of the following would be excluded in executive session: the NLRB charge; the copies of reprimands issued by the Company to other employees and workman"s compensation list. However, the logs submitted by the Company and the pictures submitted by the Local Union would be reviewed.

Mr. Sandy said that there was no harrassment towards this man by the Company;

it was the other way around. The Company was inspected three times by the DOT recently and received a clean bill of health each time.

Chairman Hunter asked Mr. Del Costello if he felt at this time that he had a full and fair hearing and been able to submit through his Business Agent all relevant evidence in his behalf.

Mr. Del Costello replied, "I have nothing else to add."

Chairman Hunter then asked, "Do you feel that you have been properly represented by your local Union through Mr. Morningstar?" Del Costello replied, "Yes."

DECISION: 3196 The panel in executive session, motion made, seconded and carried, that based on evidence presented which indicated that on the day in question the equipment was shopped and reviewed thoroughly by Company

representatives, adjustments made which revealed that the equipment was road worthy and met applicable safety requirements, the refusal of P. Del Costello to take the equipment subsequent to a direct order was unjustified. Therefore, the voluntary quit of Del Costello was upheld.

Cost to Union.

Chairman Hunter called for Case 3220:

EXHIBIT C

2204 Perry Avenue
Baltimore, Maryland 21040

September 14, 1977

Mr. Duke O'Connor
Local 557
6000 Erdman Avenue
Baltimore, Maryland 21205

Dear Mr. O'Connor:

This letter is to let you know I am not satisfied with the hearing for the following reasons:

(1) I am not satisfied because representative produced no evidence through mechanics, etc. Did not produce evidence of stated ill repair of truck through two witnesses of what truck looked like.

(2) Guaranteed by Arthur Morningstar that case would be won without production of evidence on my testimony alone.

(3) Requested a right to see and hear

witnesses who testified against me and was denied that. Company's case was presented by rumors and statements. Was not allowed to question and cross-examine statements of Company witnesses. No transcript was taken of the proceedings except minutes selectively made and unavailable. No effort made by Board to examine truck.

(4) Union representative asked no questions, did not challenge introduction of fraudulent third-hand statements of Company, for only witness who testified was me. The Company had a lawyer familiar with labor law, whereas, I had an incompetent Business Agent with no knowledge of labor law, who asked no questions, who did no research, conducted no investigation other than speaking with me for approximately five

(5) minutes, never driven a tractor-trailer truck for Anchor Motor Freight, was not knowledgable (sic) in the operation of a truck, cargo, safety devices. Total time spent with Arthur Morningstar, approximately 15-20 minutes. Total time of hearing, one (1) hour; as a result, the question of whether or not I voluntarily quit depended upon the production of evidence related to the condition of the truck which required expert testimony, the nature of which would have taken days to present in order to enable the Board to decide whether the reason for my refusal to drive was based upon the unsafe condition of the vehicle or other factors. No evidence whatsoever placed before the Board to justify termination. The refusal by me to drive a defective

truck and expose myself to risk of death or serious bodily harm, as well as the general public to death or serious bodily harm, not only violated the civil and criminal laws of the United States, but in no way could be construed under the contract as an act of voluntary quit.

I am denied procedural and substantive due process of the laws.

Representative Arthur Morningstar admitted that he was not capable of representing people in front of the Board in a competent and fair manner because he had too many other duties to perform involving other union matters and that he had too many people to represent and was unable, for that reason, to conduct a thorough investigation necessary in a discharge case.

The Board itself, even if I was afforded the right to a full hearing, the questions of safety pursuant to Bureau of Motor Carrier Safety Regulations from a legal as well as factual standpoint are beyond the Board's competence to understand.

Respectfully submitted,

Philip Del Costello

PRD/jvl

cc: Mr. Arthur Morningstar
Local 557
6000 Erdman Avenue
Baltimore, Maryland 21205

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILIP DEL COSTELLO
.
vs.

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA, et al.

CASE NO. H-78-436
CIVIL

The Deposition of PHILIP DEL COSTELLO was taken on Wednesday, August 23, 1978, commencing at 9:45 a.m., at 36 S. Charles Street, Baltimore, Maryland, before CAPPY HALLOCK, NOTARY PUBLIC.

CAPPY HALLOCK, RPR, INC.
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BALTIMORE, MARYLAND 21201
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STATE OF MARYLAND

CITY OF BALTIMORE, TO WIT:

I, CAPPY HALLOCK, A NOTARY PUBLIC OF THE STATE OF MARYLAND, CITY OF BALTIMORE, DO HEREBY CERTIFY THAT THE WITHIN-NAMED PHILIP DEL COSTELLO PERSONALLY APPEARED BEFORE ME AT THE TIME AND PLACE HEREIN SET OUT, AND AFTER HAVING BEEN DULY SWORN BY ME ACCORDING TO LAW WAS EXAMINED BY COUNSEL.

I FURTHER CERTIFY THAT THE EXAMINATION WAS RECORDED STENOGRAPHICALLY BY ME AND THIS TRANSCRIPT IS A TRUE RECORD OF THE PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NOT OF COUNSEL TO ANY OF THE PARTIES, NOR AN EMPLOYEE OF COUNSEL, NOR RELATED TO ANY OF THE PARTIES, NOR IN ANY WAY INTERESTED IN THE OUTCOME OF THIS ACTION.

AS WITNESS MY HAND AND NOTARIAL SEAL THIS _____ DAY OF _____, 1978.

_____

CAPPY HALLOCK, RPR
NOTARY PUBLIC

Your Local Union, through Mr. Morningstar, Del Costello replied, "Yes."

"You don't deny that statement in your letter of September 14th, do you?"

A No, sir.

Q As a matter of act, in your letter of September 14th, you don't argue with the minutes at all, do you?

A Yes, sir.

Q Where do you do that?

A I -- excuse me, sir. I misunderstood your question.

Q I say you don't argue with the accuracy of the minutes as they appear in your letter of September 14th?

A Yes, sir.

Q Where in your letter do you do that?

MR. ZINMAN: Why don't you take the time to read it and then answer his questions?

THE WITNESS: Okay.

A I am telling you, sir --

Q Let me interrupt you, but Mr. Feldman did testify at the hearing, didn't he?

A Yes, he did.

Q He did?

A First off, Elwood Feldman testified in place of Mr. Omullane and I said there was fraudulent third-hand information --

Q Just a minute, what your letter complains about is what you would have liked to have seen; am I correct? Your letter doesn't say that anything in those minutes is inaccurate as actually having transpired before that committee?

A Yes, sir, I do.

Q Well, tell me where it says that in your letter.

A In the minutes it says that Elwood Feldman testified on the Company's behalf. I told Arthur Morningstar when Elwood Feldman testified that he was not there, I did not talk to him. Mr. Morningstar told me, don't be ignorant like they are, keep your mouth shut --

Q But Mr. Feldman --

EXHIBIT E

STATE OF MARYLAND

CITY OF BALTIMORE, TO WIT:

I, TRIMINIE M. SHELTON, A NOTARY PUBLIC OF THE STATE OF MARYLAND, CITY OF BALTIMORE, DO HEREBY CERTIFY THAT THE WITHIN NAMED, DANIEL SANDY, PERSONALLY APPEARED BEFORE ME AT THE TIME AND PLACE HEREIN SET OUT, AND AFTER HAVING BEEN DULY SWORN BY ME ACCORDING TO LAW WAS EXAMINED BY COUNSEL.

I FURTHER CERTIFY THAT THE EXAMINATION WAS RECORDED STENOGRAPHICALLY BY ME AND THIS TRANSCRIPT IS A TRUE RECORD OF THE PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NOT OF COUNSEL TO ANY OF THE PARTIES, NOR AN EMPLOYEE OF COUNSEL, NOR RELATED TO ANY OF THE PARTIES, NOR IN ANY WAY INTERESTED IN THE OUTCOME OF THIS ACTION.

AS WITNESS MY HAND AND NOTARIAL SEAL THIS 23 DAY OF January, 1980.

/s/
TRIMINIE M. SHELTON,
NOTARY PUBLIC

Q How many people are in the Eastern Conference?

A I would say management and labor, the roster would be about 30 of each.

Q And has the membership changed much since 1963?

A Yes, it changes from time to time, local union elections and Company personnel being --

Q Natural attrition and change?

A Yes.

Q But otherwise you are familiar with most of the representatives throughout the area, is that correct?

A I am

Q Now, how long has Mr. Morningstar been a member of this Conference, if you know?

A I think he was first elected as a business agent in 1970.

Q In his capacity as a representative of

the Union he is also a member of this Conference, is that right?

A Yes, sir.

Q He sits on cases and also tries cases?

A That is correct.

Q You also try cases for Anchor Motor Freight before the same body?

A Yes, sir.

Q And when Anchor Motor Freight is not involved in a dispute you sit on the case, on cases involving other companies?

A I do.

Q You could sit on a case involving local 557 as long as Anchor wasn't involved?

A That is correct.

Q And conversely, your opposite number, Mr. Morningstar, could also sit on cases involving Anchor Motor Freight as long as 557 wasn't involved, one of the disputants?

A That is right.

Q Now, are there any other matters besides labor disputes or grievances that are taken up by the Eastern Conference?

A No, sir, it is solely constituted to adjudicate labor disputes between the parties.

Q Okay, and have you ever sat on a panel together with Mr. Morningstar and decided a discharge case?

MR. GOLDFARB: For the record, I am going to object to the entire line of questioning. Go ahead and answer.

THE WITNESS: Yes, I have sat on panels with him where it was another local and another company.

Q I understand.

A Yes.

Q Now, you indicated that, of course, you being excluded from sitting on cases that involved Anchor, I take it that that is a rule, isn't it, or procedure?

A No, it is a written rule.

Q It is not in this Exhibit 1?

A No, sir.

Q Where would that be, sir?

A There is a set of rules that govern the Conference. They have been reduced to writing and they are a matter of record.

Q Where are they kept?

A Each party is given copies of it.

Q Do you have a copy of those rules?

A I don't have it with me but can furnish you a copy.

Q I would appreciate it if you would through Mr. Goldfarb. They have their headquarters in Bethesda, Maryland.

A The Eastern Conference does, yes, sir.

Q Do they have copies there, do you know?

A Yes, sir.

Q I think you have explained essentially the function of it. This Joint Committee, I take it that when a matter comes before them

and they have to decide up or down on a discharge case, it is a majority vote?

A Yes.

Q Is this discharge either way final and binding?

A It is final and binding.

Q There is no appeal from that, is that correct?

A There is no appeal.

Q Are there written rules and regulations promulgated by the eastern Conference with respect to the actual conduct of the hearing itself?

A It is a very sophisticated, very formalized type of a hearing. They are.

Q Is this conduct, manner by which a hearing is conducted, governed by a whole set of what you have described as sophisticated rules and regulations that are reduced to writing?

A It is better conducted than what a lot of your court procedures are.

Q Again, you have a copy of these rules?

A Yes, I said I would furnish them to you.

Q You are talking about the same thing?

A They are the same thing.

Q Do you have any independent recollection of what these rules are? If I were to ask some questions for present purposes, for example, if a discharge case comes before the Eastern Conference, what are the rules with respect to who has the burden of proof?

A The Company would be the moving party and they would go first and it would be incumbent upon the Company to prove --

Q I see, and that, to the best of your recollection, is reduced to --

A No, I don't think that that is reduced to writing. I think it is a matter of

principle, a matter of arbitration.

Q The Union has a right thereafter to answer, is that correct, to respond?

A They have a right to interrogate. The Company moves first with the right to rebut, then the Union makes their presentation, then both parties have rebuttal, and then both parties are subjected to questions by one another and by the ten panel members.

Q Are there rules and regulations that permit each party to cross-examine the witnesses of the other party?

A Yes.

Q Then the parties are not precluded from cross-examining one another?

A There is cross-examination.

Q I see, and the panel members before whom the dispute comes also have the right to cross-examine?

A They do.

Q What are the rules and regulations pertaining to the introduction of evidence with respect to witnesses?

A They do accept notarized statements. They will not accept a statement that isn't notarized, and the customary practice of bringing witnesses.

Q If I may characterize it -- and if I am wrong, you correct me -- if a witness wants to relate first-hand knowledge, if you want to relate first-hand knowledge of events in order to prove something, you either have to bring a witness or if you haven't got the witness you have to take a notarized statement of somebody else under oath?

A Of a witness, yes.

Q You can't introduce hearsay testimony of a witness who isn't there?

A That is correct.

Q Now, with respect, Mr. Sandy, to things

that are not -- well, it is not testimonial evidence, it is documentary evidence, proof of things, such as repair orders, letters, things of that nature, can you introduce that documentary evidence without having an affidavit?

A Yes, sir.

Q From a practical standpoint, I am talking about, letters of a non-testimonial nature?

A Either party has the right in their discovery to ask for any documents pertaining to any information that they would want prior to coming to the committee hearing.

Q Okay. Now, in the event that either one or both parties -- what are the rules and regulations with respect to discharge? If a person is discharged for whatever reason from a company, under the contract or in accordance with the procedure, the shop stewart, or whoever it is, tries to get the man back informally, is that correct?

A That is correct.

Q By a company level hearing?

A Yes.

Q At that company level hearing, does that involve the informal disclosure by the company to the shop foreman of the reasons for the discharge?

A You mean the shop steward or foreman?

Q I'm sorry, shop steward?

A Yes, they have a level in the grievance procedure, the channels as outlined. There is the presentation of grievance and a hearing.

Q Okay.

A On an informal basis.

Q I take it that from a practical standpoint -- The representative of the union who would be at that company level hearing would be the same man that would ultimately represent the person if the case went to the

Eastern Conference, if he didn't get back to work, is that right?

A That is correct.

Q Now, at that point, when you have the company level hearing, does the company disclose all of the pertinent information to the union?

A They must.

MR. GOLDFARB: Excuse me, are you talking generally now?

MR. ZINMAN: I am talking under this contract. I am talking about under this contract.

MR. GOLDFARB: But not this specific grievance.

MR. ZINMAN: First generally.

MR. GOLDBARB: All right, I just want to interpose an objection to this line of questioning. You may answer.

MR. ZINMAN: I will narrow this and

you can object.

BY MR. ZINMAN:

Q As of June 27, 1977, was the company, was Anchor Motor Freight in a discharge case under this contract, Exhibit I, compelled to disclose to the union representative at the Company level hearing all of its relevant information in support of the discharge?

A Yes, sir, and they frown on any withholding of any evidence, and if the evidence has not been adduced at that local hearing, it can be brought up at the Conference level. You can state that so and so was involved in it, and that there will be an affidavit at the hearing. You don't necessarily have to have all parties present at the local hearing with the shop steward, but the withholding of information is a serious sin.

Q Is this reduced to writing or is this a matter of custom?

A It is a matter of custom.

Q I see, so that what you are saying, then, is that in a discharge case the custom of the Conference is to require full disclosure of all the Company's statements and testimony and its case against the employees prior to the hearing before the Conference?

MR. GOLDFARB: I object. He didn't say that. He said it didn't have to be in verified form.

MR. ZINMAN: Excuse me, Mr. Goldfarb, he is a sophisticated witness.

MR. GOLDFARB: You have not accurately given it back to him the way he testified andI don't think you mean to be tricky, so I am going to excuse you this time.

YOU MAY ANSWER IF YOU UNDERSTAND THE QUESTION.

BY MR. ZINMAN:

Q What I am asking you is, is it the

custom of the Conference to require full disclosure of the basic case of the Company. I am not talking about the little details, but the basic case of the Company against the employee prior to the hearing before the Eastern Conference?

A It isn't unilateral. Both parties are required to bring their evidence. That is, you couldn't bring pictures of an accident at the hearing that you hadn't shown to the union prior to coming to the hearing.

Q If full disclosure has not been made by one or both sides, what would the Eastern Conference do when the case came up?

A Generally they are admonitions, admonishments about the party not bringing it up, and it is -- goes to the question of credibility of the party that doesn't bring it up.

Q Oh, but if the party did not make

disclosure as you have indicated, would the party who was surprised win its case or lose or what?

A What would happen is this. Let's say that I would wait to the last minute to bring the picture of the accident and say here is thepicture of the bridge that was hit by Bill Zinman on such and such a date. If it hadn't been presented to the local prior to the hearing, it would not be admissible and I couldn't present it.

Q I see, is this a rule?

A Very strict rule.

Q Is this a written rule?

A I don't know whether it is written, I haven't seen the rules. Having lived with them every day, I haven't seen them.

Q But to the best of your recollection?

A It is a rule, strictly adhered to.

Q It is a rule, so they would exercise

the right to exclude evidence, essential evidence, not Mickey Mouse things, but essential evidence important to the case if it wasn't previously disclosed to the other side, or alternatively, they would consider the other side to lack credibility; is that the sense of it?

A Lack credibility and it would not be admissible.

Q Not admissible. Now, in the event that one side introduces evidence not previously disclosed of a very important nature, would the other side have the right under the rules and regulations of the Eastern Conference to request a postponement on grounds of surprise?

MR. GOLDFARB: I am going to object to this entire line of questioning because this is in a general area -- let me finish. You have not given him any specific case, but I

am going to let the witness answer if he knows.

MR. ZINMAN: All my questions are directed in time in this area to June 27, 1977.

MR. GOLDFARB: But you are not talking about a specific grievance hearing, are you?

MR. ZINMAN: I am talking about procedures. Before I can ask him questions, I have got to know about procedure.

MR. GOLDFARB: But you are talking about general procedure as may apply to any particular grievance?

MR. ZINMAN: Procedure applying to discharge cases as of June 27, 1977.

MR. GOLDFARB: To any discharge case as of --

MR. ZINMAN: Any discharge case.

MR. GOLDFARB: Object to the line of questioning; answer if you know.

THE WITNESS: I have stated that any party bringing information that hadn't been previously divulged to the other party, would bar -- it would be a bar before the committee, and the other party would object immediately.

BY MR. ZINMAN:

Q Well, in the event that the matter was introduced but the Eastern Conference nevertheless decided to receive the evidence, could the party against whom the evidence was introduced ask for a postponement on grounds of surprise?

MR. YALLER: I will object, speculative.

A That would be presumptive and I have never seen it in my years where it would be admissible.

Q Let me ask you this with respect to postponements, after a case is commenced are there any reasons that the Eastern Conference

will permit a postponement other than the sickness of parties or --

A Either side has a right to postponement.

Q I am talking about the middle of the case. Obviously they could postpone it before.

A I don't recall it before.

Q All right, they would have a right to seek more information if somebody had told them there was other information.

A ? They could recess the committee to obtain this information.

Q Would the committee do that on its own motion or would that be done --

A They would do it on their own.

Q If they felt, in other words --

A That it was pertinent enough that --

Q The record wasn't complete, they had to have more evidence to decide that particular case?

A Yes.

Q With respect to the case of Philip Del Costello, Mr. Sandy, I take it that ultimately you represented Anchor Motor Freight in prosecuting the discharge?

MR. YALLER: For the record -- and not to interrupt every time you ask a question, I'm sure you are going to call it a discharge again -- let me make objection to the use of the word discharge, standing objection.

BY MR. ZINMAN:

Q That is correct, you handled the case for the Company?

A I processed the case at the Eastern Conference for Anchor Motor Freight, yes.

Q And Arthur Morningstar, business agent, represented the grievant, Mr. Del Costello, is that correct?

A I believe he had two other business agents. I think he had Mr. O'Connor who was

the president of the local, and I think he had a Mr. Tom Sharman.

Q They were present, but wasn't it Morningstar who had the responsibility of handling the case?

A I don't know upon whose shoulders it falls. He was the one who presented the case in conjunction with the other gentlemen that were there.

Q Well, wasn't it Mr. Morningstar that argued the case?

A Yes, he presented the case.

Q He presented it, and Mr. Sharman didn't say anything at all, did he?

A I don't remember, I don't remember.

Q Mr. O'Connor's role in the case, wasn't it limited simply to telling about the number of Workmen's Compensation cases and injuries which occurred at Anchor Motor Freight, isn't that all he said?

A I don't remember as to what he said. I do know they were present.

Q I understand that. In any case, after Mr, Del Costello was discharged on the 27th of June of 1977 -- excuse me, terminated, to make Mr. Yaller happy or whatever -- whether we call it termination or discharge, it occurred on the 27th. Following that there was a company level hearing approximately a week later at Anchor Motor Freight on July 6 or 7, 1977?

A I believe there was.

Q Did you attend that company level hearing?

A I don't believe I did.

Q In fact, you weren't on the premises at the time of the termination or discharge, were you?

A Not on that hearing. On the July 6 hearing, I wasn't present.

Q Now, how long after the termination of Del Costello on June 27 was it that you first became aware of it through, I take it, representatives of Anchor?

A I was aware of it on or about the 27th or 28th. I was out of town, but I did have conversation with them concerning it.

Q With whom did you speak?

A Mr. Feldman.

Q Elwood Feldman?

A Yes, sir.

Q When was that?

A On the 27th or 28th, one of those days.

Q Where were you at the time?

A I was in Detroit.

Q You called in to the --

A No, sir, they called me.

Q Did Mr. Feldman call you?

A I don't know that it was Mr. Feldman

that called me. There were other matters discussed, and at that time they switched me over and I did have discussion with Mr. Feldman.

Q What did he tell you at that time?

A He related the fact that Mr. Del Costello had been given a piece of equipment and that he had found fault with it.

Q Did he --

A He related the facts to me as to what transpired that day relative to Mr. Del Costello.

Q Did he indicate to you at that time that he was a witness to it, or had somebody else told him about it, or what?

A He didn't.

Q He didn't go into that?

A I didn't question him on that.

Q Okay, and you know approximately when you received a call from Mr. Feldman?

A It was in the evening of the 27th.

Q Early, late evening?

A No, I would say about 9:00 or 10:00 at night.

Q Did you speak with anybody else at Anchor besides Feldman at that particular time, Mr. Sandy?

A I don't believe I did.

Q I take it this was a routine call that you made on general business, is that right?

A Yes, sir.

Q Did you have occasion at that time to speak with Mr. Omullane?

A I don't believe I did.

Q Did you talk to Mr. Gasper at that time?

A No, sir.

Q Did you speak with Mr. Durand at that time?

A I had conversation with Mr. Durand. I don't know what the subject matter was, but it

was Mr. Feldman who apprised me in the area of Mr. Del Costello.

Q Mr. Sandy, do you have anything at all to do with supervising or overseeing the operation of the function of the business itself in any of its departments other than -- I am not talking about labor relations now.

A Strictly labor relations.

Q That would involve, obviously, hiring and terminating people, or discharging?

A I do very little hiring. I went through a period of time where I did quite a bit of interviewing, but the work schedule became too heavy and I don't get involved in the hiring.

Q But since this would be a termination you would be interested in discussing this, is that correct?

A I do make recommendations relative to the severance, the severing of employees with

their employment, yes.

Q Do you recall, when you discussed this with Mr. Feldman, were you being asked whether Mr. Del Costello should be terminated, or had the fact of termination already occurred?

A I think the determination to sever him, that he had volunttarily quit his job, had been made before that.

Q I see. Now, did you have any further discussion with Mr. Feldman other than what you have related to us in your testimony here at that time? I am talking about when he called you, now.

A No.

Q Were there other matters that you discussed with him involving your area of interest?

A I don't recall of any.

Q Now Mr. Sandy, did someone from the Company prepare what has been described as a

case report for you involving the Del Costello termination or discharge after June 27, 1977?

A I think Mr. Gasper compiled the facts. I had had conversation with him prior to going to the conference as to what information -- number one, as to what had transpired at the local hearing and what I wanted and the write-up that would go to the Conference. I had discussion with Mr. Feldman, Mr. Durand, Mr. Omullane. I covered that with all of the Local people as to what had transpired prior to the presentation going to the Conference.

Q I see. Now, I take it that approximately -- I am not holding you to the date, but approximately a week went by from the date of the termination or discharge to the date of the company level hearing, is that right?

A Yes.

Q And at the company level hearing, do you know who was present?

A No, sir, I don't.

Q But you did discuss this company level hearing, did you not?

A I discussed it both before and after. I asked them to make sure that they found out as to who did drive the truck, check his logs, see if he had encountered any problems with the piece of equipment, et cetera.

A You don't know if Mr. Gasper was present then or not at the company level hearing?

A No, sir.

Q Or Mr. Durand, Mr. --

A Feldman? I don't know who comprised the local level hearing.

A Okay. After discussing this matter with Mr. Gasper, do you recall discussing the company level hearing with Gasper shortly after it occurred?

A Yes, sir.

Q Did you discuss this matter with Mr. Gasper personally, over the phone or both?

A Personally, and with Mr. Omullane and Mr. Feldman in person. Both.

Q Okay, now, were you satisfied after you had those discussions that the company at that point in time had disclosed to the union all the essential and pertinent information that they had justifying the termination or discharge of Mr. Del Costello?

MR. GOLDFARB: Object to the form of the question. You can answer if you know.

A I told them to make available to the union everything that we had, and not to withhold anything.

Q Do you know what they made available at that time?

A No, I don't know. I know the shop, I know they gave them -- Mr. Aiken had taken a piece of equipment and they showed Mr. Aiken's

logs, et cetera.

Q You are talking about the driver, for the record, who received the rig that Mr. Del Costello had on the 29th or the next day, whenever it was?

A Yes.

Q Were they also given the opportunity to see statements made by Mr. Omullane? I say they, I am talking about the union representatives?

A The union representatives had been told that Mr. Omullane had made certain assertions as to what happened, et cetera -- as to whether or not they had -- they don't have a formalized affidavit or -- at the local hearing, but they would have the information, what Mr. Omullane's conversation had been. This is generally pretty well detailed as to what the conversations are between the people.

Q You don't know if Mr. Gasper was

present then or not at the company level hearing?

A No, sir.

Q Or Mr. Durand, Mr. -- •

A Feldman? I don't know who comprised the local level hearing.

Q I see. Now, do you know when the formalized statement from Mr. Omullane was taken? It was taken by Gasper, wasn't it?

A I don't remember who actually took it. I know that Mr. Gasper was --

Q Didn't he prepare the case report?

A He had the secretary type the case, yes.

Q I take it he dictated the case to the secretary?

A He had discussed with me as to what information I wanted reduced to writing to assist me in my presentation.

Q Do you know the date that this case

report was typed up?

A No, sir, I don't know.

Q Would it have been after the company level hearing or before?

A Yes, after.

Q Do you know how long after?

A No, sir, I don't.

Q Do you know whether or not the case report contained a statement signed by Mr. Omullane?

A No, sir, I don't.

Q Wasn't this case report eventually presented to you so that you could present certain evidence --

A Yes, sir.

Q -- at the Eastern Conference?

A Yes, sir.

Q In going through that case report were there a number of documents attached to it?

A Yes, sir.

Q Do you have that case report today in your personal papers?

A I don't have it no. I wouldn't have any need of it. Once my presentation is made to the committee and so forth, then it is sent back to the terminal. It don't have any sentimental value -- I made a presentation. In the period of a year I may make a hundred.

Q Each time that you make a presentation, is there a case report typed up for you?

A Absolutely.

Q As extensive as the case report involving the termination of Del Costello?

A I would say the same as, if not more so.

Q I see. Does the case report have the title of the case as well as the number?

A I have a format that I demand that they use.

Q What is that format, sir?

A The format generally before the Eastern Conference, and it is -- it also describes what the location is, Baltimore, and Local Union 557, and then the case number is there, and then I have them give me the grievant, his name, his address, his date of starting with the company, the day he was severed. I have a copy of the grievance typed so I can read it very easily. Then I demand that they give me a statement in the case.

Q You also indicated the case number is on there, is that correct?

A To the right, in --

Q Just like in court, a court case?

A One of the bad things I picked up by hanging around the legal fraternity.

Q Well, this --

A It facilitates in knowing what the case number is.

Q When is this case number assigned by the Eastern Conference?

A When the case goes -- the local union sends a summary form to the Conference and the Conference at that time gives it a number. Then they send us an agenda.

Q When in point of time would that be?

A Generally it has to be in the hands of the -- about ten days before the actual hearing.

Q Ten days before the actual hearing in this case would have been on July 9, if July 19 was the date of the hearing.

A I think there is a deadline when they have to have the cases in, and then we get the agenda some two or three days later.

Q So, in other words, it would be, you say, ten days before the scheduled hearing before the Eastern Conference?

A No, a lot of times it fluctuates

between seven and eight days, or on a discharge case it can automatically come on a supplemental at any time.

Q Who makes this up?

A The Eastern Conference of Teamsters. They have a co-secretary who does the handling of the correspondence.

Q This case number would not have been assigned till about anywhere from five to eight days before the actual hearing?

A That is correct.

Q Now, when you received this case report involving Mr. Del Costello from, I take it, Mr. Gasper, did it list all of the people who had first-hand knowledge of the facts and circumstances surrounding the Del Costello termination or discharge?

MR. GOLDFARB: Just a minute. You have a copy of the report you are talking about?

MR. ZINMAN: Yes.

MR. GOLDFARB: Then why don't you show it to the witness instead of playing games with him? Hand it to him so he can look at it and then he will answer the questions. If you have the copy of the report, I am going to instruct him not to answer your question.

MR. ZINMAN: The case report is not evidence.

MR. GOLDFARB: I don't care what it is. I am going to say something for this record. You are asking him questions about a document that you have in your possession. Now, before he answers any more questions about that document, I am going to ask you to show it to him so that he can answer these questions from the document.

MR. ZINMAN: I am going to ask him, Mr. Goldfarb, if he can remember what is in the document without my showing it to him.

MR. GOLDFARB: Yes, then I am going

to say the document speaks for itself and you have got it, and I am going to instruct him not to answer if you are playing games --

MR. ZINMAN: I am not playing games --

MR. GOLDFARB: You sure are.

MR. ZINMAN: I don't have to introduce a document you make as your evidence.

MR. GOLDFARB: I am not asking you to introduce it, I am asking you to let him look at it while you question him about it, as long as you have got it.

MR. ZINMAN: I have no objection to letting him look at it.

MR. GOLDFARB: Then let him look at it. Then if you want to ask him questions about it, fine. Do you have this?

MR. YALLER: No.

MR. SATTER: No.

MR. GOLDFARB: Maybe we can have some copies made of that so they can have a copy of

it.

MR. YALLER: Off the record.

(DISCUSSION OFF THE RECORD.)

BY MR. ZINMAN:

Q Did the case report reveal the names of any people who have first-hand knowledge of the facts and circumstances surrounding the Del Costello termination?

MR. GOLDFARB: Object, there is a document speaking for itself, but answer if you know.

MR. ZINMAN: The document isn't in evidence.

MR. GOLDFARB: Go ahead.

THE WITNESS: The information was brought out as to -- that Mr. Feldman and Mr. Omullane were present during the day. I think -- I don't recall what I stated, but I am certain I would have covered that area.

BY MR. ZINMAN:

Q Well, who were the people who had first-hand knowledge of facts and circumstances surrounding the termination of Del Costello on the 27th of June?

A Mr. Omullane, Mr. Durand, Mr. Feldman and Mr. Gasper.

Q Did you speak with any of these people before the hearing?

A What hearing?

Q The hearing before the Eastern Conference on July 19, 1977?

A Yes, sir.

Q Did you speak with Omullane?

A Yes, sir.

Q That is John Omullane?

A Yes.

Q Approximately when was that?

A It was prior to going to the hearing in Atlantic City.

Q Do you have an independent recollection

--

A Yes, sir, she has.

Q When she has notarized things for you, she has stamped it with her seal?

MR. GOLDFARB: Stamps or imprint, what kind of a seal are we talking about?

MR. ZINMAN: Notarial seal.

MR. GOLDFARB: Embossed on the paper rather than rubber stamp?

MR. ZINMAN: It can be both. It can be that or it can be stamped, both ways.

THE WITNESS: I don't remember whether she did. I am a notary and I have the stamp, and I put the stamp if and when I am called upon. Somebody wants -- they sell an automobile and they want me to notarize it.

MR. GOLDFARB: Off the record.

(DISCUSSION OFF THE RECORD.)

BY MR. ZINMAN:

Q You said that you introduced the

Plaintiff's Exhibit Number 4 which was the Omullane statement to the --

A Panel.

Q -- to the panel. Before this statement was introduced the Omullane statement was introduced, do you have any knowledge whether it was ever shown to Mr. Morningstar at the company level hearing or afterwards?

A I don't know. I do know this, that the subject to Mr. Omullane's conversation with the grievant was discussed at the local level.

Q I understand that, but I am asking you now --

A No, I, I don't know whether it was or not.

Q Prior to your introduction of this statement into testimony and its presentation to the panel, did you show this statement to Mr. Morningstar?

A No, he was apprised of the contents of the statement.

Q Well, did you see the statement.

A I don't remember whether he did or not.

Q Did you give it to him?

A I would have given it to him at the committee hearings, yes.

Q At the time you sought to introduce it, did he object to its introduction?

A I don't know whether he did or not. He did object to the introduction of Aiken's log and I objected to the pictures, and the committee said they would take --

Q But there is no reference whatsoever --

I would like to introduce at this point the decision by the Eastern Conference. I will have you identify it.

MR. GOLDFARB: Have it marked, will

you?

MR. ZINMAN: As Exhibit 5. If you can't read this too well, we will make a better one.

(SANDY DEPOSITION, PLAINTIFF'S EXHIBIT NUMBER 5, WAS MARKED FOR IDENTIFICATION.)

BY MR. ZINMAN:

Q Exhibit Number 5, Mr. Sandy, purports to be the minutes of the decision of the Eastern Conference in the Del Costello case, is that correct?

A That is what it purports, yes.

Q You received this before, did you not?

A Before when?

Q That is, you received a copy of this decision?

A What you do is you receive it and at the next meeting of the Conference you will find in the minutes that they are either approved or disapproved by the panel.

Q To your knowledge, have these minutes been approved?

A They were approved by the committee.

Q I take it that in your records you have a copy of these minutes, is that right?

A Yes, sir, I do.

Q Your own personal records?

A Yes, sir.

Q Now, the records reveal all of the documentary evidence to which you referred in your earlier testimony, namely, the introduction of the logs of Mr. Del Costello, the trip report of Mr. Aiken -- or at least you made mention of it, I don't know that it refers to the Aiken trip report. Take a look, I don't want to misquote you. Does it refer to the introduction of Mr. Aiken's -- the trip assigned to Mr. Aiken, documentary evidence of that?

A Not in that document.

Q So the only mention of Aiken is here was in your opening remarks to the effect that when Mr. Del Costello refused to take the truck, it was assigned to another driver the next day, is that right, essentially? I am quoting now the minutes.

A Are you saying what the minutes reflect or what I stated?

Q I am saying what the minutes reflected.

A Yes.

Q Okay. There is no reference in these minutes whatsoever to the -- that is Exhibit 5 -- to the introduction of the Omullane statement, isn't that correct?

MR. GOLDFARB: I object, let the minutes speak for themselves. Answer if you know, go ahead, it is a document that talks and it says what it says. But all right. If he knows, so we can get on with it.

THE WITNESS: Just a second. Your question was what?

MR. ZINMAN: Read back the question.

(THE RECORD WAS READ AS REQUESTED.)

THE WITNESS: My answer would be that although the minutes don't reflect it, my presentation does.

BY MR. ZINMAN:

Q All right. In other words, your independent recollection was that you nevertheless still introduced the Omullane statement, right?

A My statement is that I did so state.

MR. GOLDFARB: It was part of Exhibit D of your statement of the case. Is that what you said?

THE WITNESS: I said that I stated that Exhibit D is a statement from Mr. Omullane.

BY MR. ZINMAN:

Q All right. In other words, your independent recollection was that you nevertheless still introduced the Omullane statement, right?

A My statement is that I did so state.

MR. GOLDFARB: It was part of Exhibit D of your statement of the case. Is that what you said?

THE WITNESS: I said that I stated that Exhibit D is a statement from Mr. Omullane.

BY MR. ZINMAN:

Q Now, Mr. Morningstar objected to the introduction of -- I think you testified that Mr. Morningstar objected to the introduction of logs, certain logs of Mr. Del Costello or work background that you introduced of Mr. Del Costello for the months of May and June of 1977, is that correct?

A No, sir, Mr. Morningstar objected to the logs, stating that they weren't discussed

Q Didn't you introduce logs, Mr. Del Costello's logs, for the months of May, certain days in May and June?

A No. The company introduced work records for the months of May and June.

Q That is what I am talking about.

A If you are saying those are logs --

Q All right, work records, logs, whatever they were, work records for May and June?

A Right.

Q And Morningstar objected to the introduction of those work records, isn't that correct?

A I don't know. It states in there that Morningstar objected that at the local level hearing these logs weren't discussed. I don't know whether he, like yourself, is interpreting the man's work record as logs, or in between there did I produce Mr. Aiken's logs. I don't know which he is talking about.

Q But in any case did he state the basis for his objection?

A Yes.

Q What was the basis?

A That they weren't presented at the local hearing.

Q Was there any other statement in support of his reason for objection besides that?

A No, sir, he said in the local level hearings these logs were not discussed.

Q But he did not object to the Omullane statement, is that correct?

A I don't remember. The minutes don't reflect it, so I wouldn't know. The minutes are not a word by word, verbatim transaction of what happened.

Q Do you have any independent recollection? You said that you showed him this statement prior to the hearing or at the hearing, this Omullane statement?

A Yes, as you would pass out your documents. You extend the courtesies.

MR. GOLDFARB: Are you going to whip this much more? It has been beaten into the ground. You must bring the IRS agents in this room. When they come in to make an audit, they must bring the IRS agents in here. It is getting awfully uncomfortable with the heat.

BY MR. ZINMAN:

Q After you introduced Elwood Feldman to the panel, did you have an opportunity to testify?

A I don't remember, but once the introduction is made the matter becomes that if anybody wants to ask him a question, once you introduce him he is open for questioning.

Q Did he relate any of the facts or circumstances?

A I don't remember whether he did or not.

Q What did you have him there for?

A If there were questions about maintenance, same as a lot of people don't know anything about law but they are lawyers.

Q That is right, you and Shakespeare. In any case then, basically, the case consisted ---- the main part of the case was the introduction of the Omullane statement and the documentary evidence, wasn't that the whole case?

MR. GOLDFARB: Was that the whole case? You said the main part and then it was the whole case.

MR. ZINMAN: Strike that.

THE WITNESS: What was my main thrust? If I knew that, I wouldn't be vice-president of the company.

BY MR. ZINMAN:

Q What did Mr. Omullane or what did Mr. Feldman -- was he asked any questions?

A I don't remember that he was.

Q Did he participate in any way that you can recall?

A I don't remember. If there was an interpretation on those work records that you have, he would have to give it, not I.

Q When you say work records, I am a little confused. Are you talking about logs of Mr. Del Costello?

A I can read logs. I don't want to get involved in the maintenance record.

Q I am not talking about maintenance records. You say Mr. Del Costello's work records were introduced for the month of May and June, 1977. What do you mean, talking about logs?

A I can interpret those, the work records that you have the copy of.

Q I think you indicated that essentially on the 20th of June he sat on the clock

for 9 and a half hours. Was that what you told --

A I don't remember. Where are you reading from, the minutes?

MR. GOLDFARB: Give me a copy of the

A Yes, sir.

Q And did you meet with him the day before, with Mr. Morningstar?

A Yes, sir.

Q And when was the hearing held? Was it in July of 1977?

A July 19th.

Q July 19th?

A Yes, sir.

Q 1977?

A Yes, sir.

Q At Atlantic City?

A Yes, sir.

Q At Atlantic City?

A Yes, sir.

Q In the Howard Johnson's Regency Hotel?

A Yes, sir.

Q Were you present at the hearing?

A Yes, sir.

Q Can you describe the hearing room? Did it look like a conference room?

A Yes, sir.

Q And was there a table with the committee, the grievance committee, seated at the table?

A Yes, sir.

Q Do you remember how many people were seated at that table, if you can remember?

A No, sir.

Q Well, do you know whether some of those people were union representatives and some were employer representatives?

A I was told they were.

Q Did you know any of them?

A No, sir.

Q And who was with you besides Mr. Morningstar?

A Mr. Duke O'Connor and Tom Sharman.

Q And who is Mr. Sharman?

A Chief Shop Steward.

Q And who is Duke O'Connor?

A President of Local 557.

MR. ZINMAN: For the record, that is Patrick O'Connor.

Q And Mr. Morningstar?

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A Yes, sir.

Q And who was there on behalf of Anchor Motor Freight?

A Dan Sandy and Elwood Feldman

MR. YALLER: Could you spell the second name?

THE WITNESS: Mr. Elwood Feldman.

MR. YALLER: How do you spell his last name?

THE WITNESS: F E L D M A N.

BY MR. GOLDFARB:

Q Now, who did the talking on your behalf?

A Arthur Morningstar.

Q And did you have an opportunity to say something?

A Yes, sir.

Q Anybody stop you or prevent you from talking?

A Yes, sir.

Q Who?

A Arthur Morningstar.

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Q How did he do that?

A He told me, don't be ignorant and keep your mouth shut.

Q Did you keep your mouth shut?

A Yes, sir.

Q Didn't you read a prepared statement?

A Yes, sir.

Q Then you didn't keep your mouth shut, did you?

A I was instructed I could read the statement.

Q Did anybody else from the union do any talking?

A Yes, sir.

Q Who?

A Duke O'Connor.

Q And did he talk on your behalf?

A Yes, sir.

Q And did anybody else do any talking?

A Yes, sir.

Q Who?

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A Arthur Morningstar.

Q And did he talk on your behalf?

A Yes, sir.

Q And who talked for the company?

A Mr. Elwood Feldman and Dan Sandy.

Q Do you recall at the end of that hearing you were asked if you had anything to add to it?

A Yes, sir.

Q And what did you say?

A I said I will make the decision when I hear your decision.

Q Were you asked before the hearing recessed if you wanted to add anything to the case, to the evidence?

A No, sir.

Q You weren't asked that?

A Excuse me, I don't understand, sir.

Q I said were you asked near the conclusion of that hearing whether you wanted to add anything to it, any more than what was said?

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A No, sir.

Q You were not asked that?

A No, sir.

Q Do you recall being asked if you had been properly represented by your union?

A No, sir.

Q Did you ever see the minutes of that meeting?

A Yes, sir.

Q When did you see those minutes?

A I believe it was on August the 19th.

Q How did you get a copy of them?

A They were sent to me in the mail.

Q And when they were sent to you in the mail, did they come from the union?

A Yes, sir.

Q And did they ask you if you had any objection to the minutes.

A In the letter, yes, sir.

Q Did you say you had any objections to the minutes?

A I called Arthur Morningstar and explained --

Also have a letter sent to the National Labor Relations Board referring to Defendant's Exhibit 53.

A Yes, sir.

Q And that letter is signed by Stephen R. Early, is that correct?

A Yes, sir.

Q Who is Mr. Early, is he a lawyer?

A Yes, sir.

Q And who is he associated with?

A P.R.O.D., Washington, D.C.

MR. ZINMAN: Pardon me, Mr. Goldfarb, may I take off for about 30 seconds?

MR. GOLDFARB: Yes, go ahead.

(DISCUSSION OFF THE RECORD.)

(SHORT RECESS.)

BY MR. GOLDFARB:

Q I will show you, Mr. Del Costello,

Defendant Anchor's Exhibit 38 which is a letter from Mr. Morningstar to you forwarding a copy of the minutes, and in the letter he says, "The enclosed minutes will be approved at the September 20th meeting of the Eastern Conference Joint Area Committee. 74
If you have any additions, deletions or corrections, please put them in writing and send them to me immediately. Failure to do so, I will submit the minutes as being approved."

Now, can you tell me whether you communicated with him in writing in response to this letter?

A Yes, sir.

Q And which letter is that? Can you show me which letter you wrote to him in reply to this?

A Yes, sir.

Q And that is Defendant Anchor Exhibit 39, is that correct?

A Yes, sir.

Q All right, will you hold that for a minute?

Now, in the letter dated September 14th, 1977 -- would you take a look at it and I just want you to answer these questions yes or no, and we will move on -- you don't deny the statement made, "Do you feel that you have been properly represented by your local union through Mr. Morningstar, Del Costello replied, "Yes", You don't deny that statement in your letter of September 14th, do you?

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A No, sir.

Q As a matter of fact, in your letter of September 14th, you don't argue with the minutes at all, do you?

A Yes, sir.

Q Where do you do that?

A I -- excuse me, sir. I misunderstood

your question.

Q I say you don't argue with the accuracy of the minutes as they appear in your letter of September 14th?

A Yes, sir.

Q Where in your letter do you do that?

MR. ZINMAN: Why don't you take the time to read it and then answer his questions?

A First off, Elwood Feldman testified in place of Mr. Omerline, and I said there was a fraudulent third-hand information --

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Q Just a minute, what your letter complains about is what you would have liked to have seen, am I correct? Your letter doesn't say that anything in those minutes is inaccurate as actually having transpired before that committee?

A Yes, sir, I do.

Q Well, tell me where it says that in your letter.

A In the minutes it says that Elwood Feldman testified on the Company's behalf. I told Arthur Morningstar when Elwood Feldman testified that he was not there, I did not talk to him. Mr. Morningstar told me, don't be ignorant like they are, keep your mouth shut --

Q But Mr. Feldman --

A I am telling you, sir --

Q Let me interrupt you, but Mr. Feldman did testify at the hearing, didn't he?

A Yes, he did.

Q He did?

was not really what I was getting at. I know why the lawsuit was filed. That is not what I was trying to get at. Why did you wait until January of '78 to make the decision, or what took so long to make the decision?

A I waited until I exhausted my internal union remedies.

Q And that was not until January of '78?

A Yes, sir.

Q What internal union remedies did you exhaust?

A The grievance machinery. That's all.

Q The grievance machinery under the contract?

A Yes, sir.

Q When was the grievance machinery under the contract exhausted?

A Mr. Morningstar -- I asked Mr. Morningstar -- I guess Mr. Morningstar told me it was exhausted and the decision was final and binding. I asked him at a union meeting.

Q What decision?

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A The Eastern Conference decision.

Q When did he tell you that?

A At the meeting.

Q What --

A January -- December-January of 1977 -- December of '77, January of '78.

Q One of those two?

A One of those two meetings.

Q Did you take any other action to exhaust any internal union remedies other than to ask Mr. Morningstar as to the finality of the Eastern Conference decision?

A Yes, sir.

Q What actions, if any, did you take?

A I talked with Mr. Morningstar and

told him I was dissatisfied with the decision and went over the reasons why I was dissatisfied. I have to answer I didn't file any other grievances, any other grievances on it.

Q You are talking about internal union grievances?

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A The panel asked me was I satisfied, did I feel that I had -- they asked me was I satisfied, did I feel I had a full and fair hearing and I said to them I will make the decision when you make your decision. They asked the question a second time. I said I don't know. Then he spoke loud --

Q Who is the "he" you are talking about?

A Chairman Hunter, that he expected that I answer that question, that I was being compelled to answer that question.

Q What question?

A Three times the same question. I

said I don't know, I guess so.

Q Was that the end of the hearing?

A Yes, sir.

Q What happened when the hearing was over, what did you do?

A I left.

Q Walked out of the room, walked to your car and drove back to Baltimore?

A I believe I made a phone call and then I

Mr. Hunter, the chairman, as to whether or not you felt that you were properly represented, and I think you replied that you said you would give your answer when they give you yours, or something like that. The second time you said no, I don't know, and the third time, I don't know, I guess so, or something like that. Is that essentially correct?

A Yes, sir.

Q All right now, Mr. Del Costello, could you tell us what, if any, reaction was elicited when you responded to the first question, I will give you your answer when you give me mine?

A Everybody in the room laughed at me.

Q Now, you indicated that you found fault with the minutes, according to Anchor's Exhibit Number -- I guess it is 38 -- and I

think you indicated or you responded earlier to Mr. Goldfarb -- I don't recall all of your testimony -- but I think you answered him to the effect that you found certain things wrong with what Mr. Morningstar did or didn't do but you -- and then you answered some questions with respect to what you felt was wrong. Now, let me ask you, did Mr. Feldman testify? I think you indicated he testified. 171

A Yes, sir, he did, and --

Q Was that included in the minutes, his testimony?

A No, sir.

Q And you say Feldman testified, and does his testimony appear anywhere in the minutes?

A No.

Q Now, you also indicated that Duke O'Connor testified, did you not?

A Yes, sir.

Q Is his testimony indicated anywhere in the minutes?

A No, sir.

Q Approximately how long, excluding time or times that was taken for recesses to which you alluded earlier when Mr. Yaller asked you the question concerning that, approximately how long did the hearing take?

SANDY DEPOSITION: DECEMBER 19, 1979

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

PHILIP DEL COSTELLO)

vs.)

INTERNATIONAL BROTHERHOOD) CASE NO. H-78-436

OF TEAMSTERS, CHAUFFEURS,) CIVIL

WAREHOUSEMEN AND HELPERS)

OF AMERICA, et al.)

The deposition of Daniel Sandy was taken on Wednesday, December 19, 1979, commencing at 10:40 A.M., at the offices of Melnicove, Kaufman & Weiner, 36 South Charles Street, Baltimore, Maryland, before Triminie M. Shelton, Notary Public.

CAPPY HALLOCK, RPR, INC.
800 MERCANTILE BUILDING
2 HOPKINS PLAZA
BALTIMORE, MARYLAND 21201
(301) 752-1733)

trouble.

Q I am talking about not the involuntary or voluntary sense, I am talking about -- obviously, all employment has to be consensual -- but I am talking about the definition of the -- when the contract provides that a man loses his seniority if he quits his job, is there anything in that contractual provision that says if he is subordinate or if he is willfully insubordinate or if he breaks a company rule, that he quits?

A It is the question of intent in the industrial relations context. If he says I refuse or I am not going to do what you tell me to do, then he has quit.

Q All right. So again, you correct me if I am wrong, would you define a voluntary quit as a willful refusal by an employee to follow the instructions of the company provided that those instructions are not in violation

of the contract and not in violation of the law?

MR. GOLDFARB: I am going to object to it, calling for a legal conclusion as to what is in violation of the law.

MR. ZINMAN: Read the question back, please.

(THE RECORD WAS READ AS REQUESTED.)

THE WITNESS: I don't think either was violated, the law or the contract.

BY MR. ZINMAN:

Q I am asking you if that would be how you would define a voluntary quit?

A How I would define it?

Q In other words, would you define a voluntary quit as any refusal by an employee to follow instructions, lawful instructions, by the Company?

A Yes, and those instructions --

Q Obviously to be lawful, the

instructions could not violate the contract or the law.

A Then I would say in this instance neither was violated, either the law or the --

Q But would that be a fair definition of voluntary quit?

MR. GOLDFARB: I object to it again, but answer if you can.

A I can't follow your meanderings as to what the law -- 502 of Protected Activity -- in the context of industrial relations when a man is given an order to do something and he fails to carry through and says I am not going to do it, and then you explain to him that his refusal does constitute a voluntary quit and he tells you to go to hell, he has quit.

Q That is what I am asking you, Mr. Sandy. The only thing I asked you with regard to the law was, obviously, if the

instruction you gave to the man was a violation of the union-company contract or the law, it would be unlawful instruction, but with that understanding that the instruction or order would be an appropriate instruction or order for the company to give the man --

A I think it was a reasonable instruction.

Q And he refused to take that instruction, in your view that would constitute a voluntary quit regardless of what that instruction would consist of?

A Not if it were reasonable.

Q I am assuming if it were appropriate and reasonable. Now, in a situation where you charge a man with voluntary quit by reason of his refusal to obey --

A Carry out a reasonable order.

Q Carry out a reasonable order, you would not have to notify him, give him a prior

warning?

A No.

Q Isn't that a rather nice way of getting around Section 40?

MR. GOLDFARB: I object to that.

A No, no, no. To force him to work after he has said he has quit would be enslavement.

MR. GOLDFARB: How would you do that?

Q What if an employee such as Mr. Del Costello indicates that he is not quitting, that he is just refusing to follow that particular instruction?

A You are getting into a question of semantics.

Q Are you suggesting that every time somebody refuses to follow an appropriate order of the company, he quits?

A If it is reasonable, not done capriciously or arbitrarily, I think the company

has a right to expect. That is the reciprocity -- you pay a wage and he is expected to work, and if he wants to quit I don't think you can confine him.

Q I am not quibbling with you as to whether or not it is reasonable. I am not arguing about the reasonableness of the order, nor is the objective of the question to say that the employee is right in disobeying it. It is the definition which I am interested in. Now, what this is, really, what we are talking about is really an act of insubordination, and we are assuming that the insubordination is unjustified in following the order.

Making that assumption, Mr. Sandy, do you seriously suggest that for that act of insubordination, from the standpoint of the contract, it constitutes a quit?

MR. GOLDFARB: I object to it as being vague and argumentative. Answer if you know.

A I most seriously say the opposite would be anarchy, where people would tell you I am going to work or I am not going to work, or you give them a reasonable order to -- say, he is there, a truck driver, you furnish a truck and a load, and if he doesn't want to work --

Q All right, for example, if the order was given to Mr. Del Costello to drive what would appear to be a safe truck and he refused, why didn't the company say you are fired for insubordination? Why did they have to say he voluntarily quit?

A The company took the position that he voluntarily quit his job. That is the reasonable -- and in the industrial relations history when a man does what Mr. Del Costello did, that is a voluntary quit.

Q Doesn't the history reflect a simple response that you are fired because you won't do the job properly?

A No, no, no. He opts that I don't want

to work here any more.

Q Well, he didn't say he didn't want to work here. He was insubordinate from your standpoint in refusing to take what your people regarded as a safe truck.

MR. GOLDFARB: I object as being argumentative. You have been going over it again and again.

Q Isn't that what the real thrust is?

MR. GOLDFARB: Answer it again for him.

A The real thrust is he refused to follow a reasonable rule of industrial relations that you do the work and then you grieve, and if he had a grievance he had to take the load to Ste. Theresa and come back --

Q I understand that, but I am saying why didn't you regard that as a firing? When he was insubordinate and he was terminated, why didn't you say he was fired?

A Because that wasn't necessarily so. He voluntarily quit his job when he refused to

follow a reasonable order.

Q Was there any evidence he walked off the job?

A He refused to take the truck. The fact of the matter is he had to be forced off the property by police.

Q Didn't he insist upon getting another truck?

A No -- I don't know. I am not going into that. I don't know the merits of the case. I don't know word for word what happened. My presentation was that he refused to follow a reasonable order, and in the context of that contract, that is a voluntary quit.

Q Is there any specific provision in the contract, Exhibit 1, that says that insubordination is a voluntary quit?

A I stated before that there isn't, and it wasn't based on that. It was based on his voluntary quitting, and if he quits he loses

his seniority.

Q In other words, it is your interpretation of --

A Backed by ten panel members and the history of industrial relations.

MR. ZINMAN: No other questions.

MR. YALLER: I have something. It will be short.

National Master Automobile Transporters Agreement

and the

Central and Southern

Conference Areas

SUPPLEMENTAL AGREEMENTS

Covering Truckaway, Driveaway

Local and Garage Operations

PART I General, Including Uniform Rules and Regulations

PART II Truckaway

PART III Driveaway

PART IV City Delivery, Pull-Out, Mounting Service and Yard

PART V Garage

JUNE 1, 1976, THRU MAY 31, 1979

NATIONAL MASTER

AUTOMOBILE TRANSPORTERS

AGREEMENT

***

For the Period

June 1, 1976

thru

May 31, 1979

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AUTOMOBILE TRANSPORTERS

AGREEMENT 1976-1979

NATIONAL MASTER AUTOMOBILE TRANSPORTERS

AGREEMENT COVERING TRUCKAWAY, DRIVEAWAY

AND LOCAL AGREEMENTS

FOR THE PERIOD

June 1, 1976 thru May 31, 1979

covering:

operations in, between and over all of the states, territories and possessions of the United States, and operations into and out of all contiguous territority. The NATIONAL AUTOMOBILE TRANSPORTERS LABOR DIVISION and

---------- hereinafter referred
(Company)
to as the "Employer", and

The Teamsters National Automobile Transporters Industry Negotiating Committee representing the Local Unions affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF

AMERICA, hereinafter referred to as the "Union", agree to be bound by the terms and conditions of this Agreement.

such changed operations are put into effect, the matter shall be submitted to the National Joint Arbitration Committee for final disposition. Rates agreed upon or awarded shall be effective as of the date the changed operations were put into effect.

Section 5 Skids

The employer will make every effort to resolve all problems arising from the handling of skids, including health and safety. If the problem is not resolved, it shall be submitted to the grievance procedure contained in Article 7 of this Agreement.

ARTICLE 7.

Grievance Machinery

Section 1.

The parties agree that all grievances and questions arising from the provisions of this

Agreement shall be submitted to the grievance procedure for determination.

No Strike and/or Lockout

The Unions and the Employers agree that there shall be no strike, tie-up of equipment, slowdowns or walkouts on the part of the employees, nor shall the Employer use any method of lockout or legal proceeding without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise.

Any disputes the parties are unable to settle shall be referred to the appropriate Automobile Transporters Joint Conference Artibtation Committee, except

for the following direct violations, which are non-disputable:

(a) Nonpayment of the established rates provided for in this Agreement, Supplements or Riders;

(b) Nonpayment of health and welfare contributions as provided for in this Agreement, Supplements or Riders;

(c) Nonpayment of pension contributions as provided for in this Agreement, Supplements or Riders;

(d) Noncompliance with Joint Arbitration Committee decisions with respect to Article 3, Section 4;

(e) This paragraph does not

apply to disputes over the computation of wages or application of rates.

Section 2: Work Stoppages

(a) It is mutually agreed that the Local Union will, within two (2) weeks of this Agreement, serve upon the Employer a written notice listing the Union's authorized representatives who will deal with the Employer, make commitments for the Local Union generally and, in particular, those individuals having the sole authority to act for the Local Union in calling or instituting strikes or any stoppages of work which are not in violation of this Agreement. The Local Union may from time to time amend its listing of

authorized representatives by certified mail. The Local Union shall not authorize any work stoppage, slowdown, walkout, or cessation of work in violation of this Agreement. It is further agreed that in all cases of an unauthorized strike, slowdown, walkout, or any unauthorized cessation of work which is in violation of this Agreement the Union shall not be liable for damages resulting from such unauthorized acts of its members. In the event of a work stoppage, slowdown, walkout or cessation of work not permitted by the provisions of Article 7, Section 1, alleged to be in violation of this Agreement, the Employer

shall immediately send a wire to the appropriate Area Conference to determine if such strike, slowdown, walkout or cessation of work alleged to be in violation of this Agreement shall be deemed to be authorized unless notification thereof by telegram has been received by the Employer and Local Union from such Area Conference. If no response is received by the Employer within twenty-four (24) hours after request, excluding Saturday, Sunday and holidays, such strike, etc., in violation of this Agreement shall be deemed to be unauthorized by the Area Conference for the purposes of this Agreement.

In the event of such unauthorized work stoppage or picket line, etc., in violation of this Agreement, the Local Union shall immediately make every effort to persuade the employees to commence the full performance of their duties and shall immediately inform the employees that the work stoppage and/or picket line is unauthorized and in violation of this Agreement.

The question of whether employees who refuse to work during such unauthorized work stoppages, in violation of this Agreement, or who fail to cross unauthorized picket lines at their Employer's premises shall be considered as participating in an unauthorized

work stoppage in violation of this Agreement, may be submitted to the grievance procedure. The International Brotherhood of Teamsters, Teamsters National Automobile Transporters Industry Negotiating Committee, Area Conferences, Joint Councils and Local Unions shall make immediate efforts to terminate any strike or stoppage of work as aforesaid which is not authorized by such organizations, without assuming liability therefor. For and in consideration of the agreement of the International Brotherhood of Teamsters, Teamsters National Automobile Transporters Industry Negotiating

Committee, Area Conferences, Joint Councils and Local Unions shall make immediate efforts to terminate any strike or stoppage of work, as aforesaid, which is not authorized by such organizations, without assuming liability therefor. For and in consideration of the agreement of the International Brotherhood of Teamsters, Teamsters National Automobile Transporters Industry Negotiating Committee, Area Conferences, Joint Councils, and Local Unions affiliated with the International Brotherhood of Teamsters to make the aforesaid efforts, including the use of all reasonable means at their disposal to require Local Unions

and their members to comply with the law or the provisions of this Agreement, including the provisions limiting strikes, work stoppages, as aforesaid, the Association and Employers who are parties hereto agree that they will not hold the International Brotherhood of Teamsters, Teamsters National Automobile Transporters Industry Negotiating Committee, Area Conferences, or Joint Councils liable or sue them in any court or before any administrative tribunal for undertaking such efforts to terminate unauthorized strikes or stoppages of work, as aforesaid, or for undertaking efforts to

terminate unauthorized strikes or stoppages of work, as aforesaid, or for undertaking such efforts to require Local Unions and their members to comply with the law or the provisions of this Agreement. It is further agreed that the signator association and Employers will not hold the International Brotherhood of Teamsters, Teamsters National Automobile Transporters Industry Negotiating Committee Area Conferences, Joint Councils or Local Unions liable or sue them in any court or before any administrative tribunal for such efforts to terminate strikes or stoppages of work or requiring Local Unions and their members

to comply with the law or the provisions of this Agreement, or for taking no further steps to require them to do so. The provisions of this Article shall continue to apply during that period of time between the expiration of this Agreement and the conclusion of the negotiations or the effective date of the successor Agreement, whichever occurs later. It is understood and agreed that failure by the International Brotherhood of Teamsters, Teamsters National Automobile Transporters Industry Negotiating Committee, Area Conferences, and/or the Joint Councils to authorize a strike by a Local Union shall not

relieve such Local Union of liability for a strike authorized by it and which is in violation of this Agreement.

(b) The question of whether the International Union, Teamsters National Automobile Transporters Industry negotiating Committee, an Area Conference, Joint Council or Local Union have met their obligation set forth in the immediately preceding paragraph or the question of whether the International Union, Teamsters National Automobile Transporters Industry Negotiating Committee, an Area Conference, Joint Council, or a Local Union, separately or jointly, participated in

in an unauthorized work stoppage, slowdown, walkout or cessation of work in violation of this Agreement by calling, encouraging, assisting or aiding in such stoppage, etc., in violation of this Agreement, or the question of whether an authorized strike provided by Article 7, Section 1, is in violation of this Agreeent, or whether an Employer engaged in a lockout in violation of this Agreement shall be submitted to the grievance procedure at the national level, prior to the institution of any damage suit action. When requested, the Co-Chairman of the National Joint Arbitration Committee shall immediately appoint a

subcommittee to develop a record by collecting evidence and hear testimony, if any, on the sole question of whether the International Union, Teamsters National Automobile Transporters Industry Negotiating Committee, an Area Conference, Joint Council or Local Union have met their obligation, as aforesaid, or of Union participation or Employer lockout in violation of this Agreement. The record shall be immediately forwarded to the National Joint Arbitration Committee for decision. If a decision is not rendered within thirty (30) days after the Co-Chairmen have convened the National Committee, the matter

shall be considered deadlocked. A majority decision of the National Committee on the questions presented, as aforesaid, shall be final and binding on all parties. If such majority decision is rendered in favor of one or more of the Union entities, or the Employer, in the case of lockout, no damage suit proceedings on the issues set forth in this Article shall be instituted against such Union entity or such Employer. If, however, the National Committee is deadlocket on the issues referred to in this subsection 2(b), either party may institute damage suit proceedings, but the

record of the National Joint Arbitration Committee and its Subcommittee shall not be offered in evidence by either party in this subsection 2(b), agreement to utilize this procedure shall not thereafter in any way limit or constitute a waiver of the right of the Employer or Union to commence damage suit action. However, the use of evidence in this procedure shall not waive the right of the Employer or Union to use such evidence in any litigation relating to the strike or lockout, etc., in violation of this Agreement. There shall not be any strike, slowdown, walkout, cessation of work or lockout as

a result of a deadlock of the National Joint Arbitration Committee on the questions referred to under this subsection 2(b), and any such activity shall be considered a violation of this Agreement.

(c) In the event that an Employer, party to this Agreement, commences legal proceedings against the Union after the Union's compliance with the provisions of Article 8, Section 2(a), the Employer Association will cooperate in the presentation to the court of applicable majority grievance committee decision or grievance deadlocked by the National Grievance Committee.

(d) Nothing herein shall prevent the Employer or Union from securing remedies granted by law except as specifically set forth in this subsection 2(b).

Section 3. Grievance Procedure

Disputes and grievances shall first be taken up by the employee involved, and if no settlement is reached, then taken up between the Steward or Business Agent of the Local Union involved and the Employer representative. Disputes and grievances shall be put in writing and presented to the Company within one (1) week, whenever possible, after the grievance arises, but in no case later than thirty (30) days after the grievance

arises, except as may be otherwise provided in a supplemental agreement. The Company must reply to the written grievance in writing to the Local Union within fourteen (14) days. The Company must designate its representatives at each facility who are authorized to settle grievances on the local level and must so notify the Local Union with one (1) week of the consummation of this Agreement. In the event the unauthorized representatives of the Company or the Union changes during the life of this Agreement, the Company shall notify the Union or the Union shall notify the Company, as the case may be, within one (1) week

of such change. After the dispute or grievance is reduced to writing, the said Company representative will make available for inspection by the Business Agent and/or Stewart, time sheets and all such other records as are pertinent to the handling of the specific dispute or grievance. This does not preclude nor prevent an oral attempt on the part of the Business Agent or Steward to settle such dispute or grievance before a request is made for such record. The dispute or grievance must be settled or deadlocked at the local level within five (5) days, excluding Saturday, Sunday and holidays, after the Business Agent has

taken it up. After the five (5) day period, not not later than fifteen (15) days, either party has the right to file its grievance with the appropriate Local Committee or Joint Conference Arbitration Committee referred to in Section 4 by Company and Local Union. Time limits as set forth in this Section shall apply equally to the Employer and the Union. The following procedure shall then apply:

Section 4. National Automobile Transporters Joint Arbitration Committee

(a) The Employers and the Unions from each of the designated Conference areas shall together establish for the duration of this Agreement, the National Automobile Transporters Joint

Arbitration Committee, hereinafter referred to as the National Joint Arbitration Committee. Any Penel of the National Joint Arbitration Committee hearing a case shall consist of an equal number of designated representatives of the Employers and the Unions who are parties to this Agreement.

Joint Arbitration Conference Committees

(b) The Employers and the Unions, parties to this Agreement, shall together, for the duration of this Agreement, in the appropriate areas referred to in Article 1, Section 1, establish Automobile Transporters Joint Arbitration Committees to be designated as:

(1) Central-Southern Conference

Automobile Transporters Joint Arbitration Committee;

(2) Western Conference Automobile Transporters Joint Arbitration Committee;

(3) Eastern Conference Automobile Transporters Joint Arbitration Committee.

Any panel of a Joint Conference Arbitration Committee hearing a case shall consist of an equal number of designated representatives of the Employers and the Unions who are parties to this Agreement from the appropriate area.

Joint State of City Automobile Transporters Grievance Committees

(c)(1) The Employer and the Union in each city and/or area in the Central/Southern Conference and Western

Central-Southern Conference and Western Conference Areas

ference areas where there are three or more Truckaway and/or Driveaway companies, shall together create a permanent Local Joint Committee, which shall consist of an equal number appointed by Employers and Union, but not less than three (3) from each group. Each member may appoint an alternate in his place.

(2) The Employers and Local Union shall agree upon the number of and geographical location of Joint State Automobile Transporters Grievances Committees to function hereunder.

(3) The Local Joint Committee shall, at their first

meeting, formulate rules of procedure to govern the conduct of its proceedings. However, if the Committee fails to agree upon rules of procedure, the matter shall be referred to the appropriate Joint Conference Arbitration Committee, which Committee shall formulate rules of procedure for the Local Committee. Each Local Joint Committee shall have jurisdiction over disputes and grievances involving said Local Union.

Section 5. Function of National Joint Arbitration Committee

(a) It shall be the function of the National Joint Arbitration Committee to settle disputes and grievances which arise under the

following circumstances:

(1) Involving interpretations or of disputes over the provisions of the National Master Automobile Transporters Agreement.

(2) Disputes and grievances the determination of which affect an employer and/or Union operating in two or more of the designated Conference Areas if more than one area is affected by the issue.

(3) Disputes and/or grievances which are deadlocked or referred by any of the three Joint Conference Arbitration Committees referred to above.

(4) Disputes and interpretations concerning alleged conflicts in provisions of the National Master Agreement, on the one hand, and Area Supplements and Riders thereto on the other hand.

The National Joint Arbitration Committee shall meet at mutually agreed times and shall formulate rules of procedure to govern the conduct of its proceedings.

Functions of the Automobile Transporters Joint Conference Arbitration Committees.

(b) It shall be the function of the Automobile Transporters Joint Conference Arbitration Committees to settle disputes and grievances which cannot be settled in accordance with Section 3 of this Article. The Joint Conference Arbitration Committees

shall meet at mutually agreed times and shall formulate rules of procedure to govern the conduct of their proceedings.

Function of City or State Committee.

(c) It shall be the function of the various Local Committees in the appropriate Conference Area, above referred to, to settle disputes which cannot be settled by the Employer and the Local Union in accordance with the procedure established herein.

Section 6. Rights of National, Joint Conference and Local Arbitration Committees.

The Committee shall have the right to investigate all facts pertaining to the dispute. Both parties shall be entitled to present such evidence and witnesses in support of their position as they see fit. A decision

by a majority of a Panel of any of the Committees shall be final and binding on all parties, including the employee and/or employees affected. The Committees referred to above shall have the authority to order full, partial or no compensation in deciding disputes and/or grievances and rendering awards.

Section 7. Board of Arbitration.

(a) If any grievance or disagreement is deadlocked by the National Joint Arbitration Committee, as provided above, then both the Union and the Employer shall submit the grievance to a Board of Arbitration consisting of three (3) members:

One (1) member to be appointed by the Union;

One (1) member, by the Employer; and the

Two (2) together appointing a third disinterested arbitrator.

All grievances submitted to the Board of Arbitration must be heard and disposed of within thirty (30) days. The findings and decision of a majority of the Arbitration Board shall be final and binding on the parties involved.

(b) It is agreed that the arbitrator is empowered to hear and decide the deadlocked case, if only one of the parties submits to arbitration

or, if either party fails to appear at the hearing or to present evidence. The arbitrator shall have the authority to interpret and apply the provisions of this Agreement or Supplements thereto where appropriate, but shall not have the authority to amend or modify this Agreement or Supplements thereto, or establish new terms and conditions under this Agreement or Supplements thereto.

(c) The cost of the arbitrator shall be shared equally by both the Local Union and Employer involved.

Section 8. (a) It is agreed that all matters pertaining to the

interpretation of any provision of this National Master Agreement, whether requested by the Employer or the Union, must be submitted to the National Automobile Transporters Joint Arbitration Committee, which Committee, after listening to testimony on both sides, shall make a decision.

(b) It is agreed that all matters pertaining to the interpretation of any provision of a Conference (area) Joint Arbitration Committee, which Committee, after listening to testimony on both sides, shall make a decision.

(c) Any decision of any of the Joint Arbitration Committees

referred to above, shall be final and conclusive and binding upon the Employer and the Union, and the employees involved.

Section 9. Failure of either party involved to comply with any final decision of a panel of any Joint Committee established under this Article within ten (10) days shall give the other party the immediate right to all legal and economic recourse.

Section 10. The procedure set forth in the Local, State and Area grievance machinery and in the national grievance procedure may be invoked only by the authorized Union representative or by the Employer. Authorized

representatives of the Union may file grievances alleging violation of this Agreement under local grievance procedure. Time limitations regarding the filing of grievances, if not set forth in the respective Supplemental Agreements, must appear in the Rules of Procedure of the various grievance committees and shall apply equally to Employers and employees.

Section 11. Unless otherwise expressly provided in this Agreement, any and all disputes, including interpretations of contract provisions arising under, out of, in connection with, or in relation to this collective bargaining agreement,

shall be subject to the grievance procedure of the Agreement.

Section 12. All meetings of Joint Committees referred to in this Article must be attended by each member of such committee or his alternate.

Section 13. All local, conference, and national grievance committees as constituted under this agreement shall have the jurisdiction and power to decide grievances which arose under the preceding agreements and supplements thereto, applying, however, the contract under which the grievance arose.

ARTICLE 8.
Protection of Rights

Section 1. Picket Line

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an

an employee refuses to enter upon any property involved in primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement, and including primary picket lines at the Employer's place of business.

Section 2. Struck Goods

It shall not be a violation of this Agreement, and it shall not be a cause for discharge or disciplinary action if any employee refuses to perform any service which his Employer undertakes to perform

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILIP DEL COSTELLO	*	
Plaintiff	*	
vs	*	CIVIL ACTION
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al.	*	NO. J-78-436
Defendants	*	

ARGUMENT OF PLAINTIFF IN SUPPORT OF ITS ANSWER TO MOTION FOR SUMMARY JUDGMENT

ISSUES

I

SHOULD THE SUPREME COURT'S DECISION IN MITCHELL BE GIVEN PROSPECTIVE OR RETROSPECTIVE EFFECT?

II

ASSUMING THAT MITCHELL SHOULD BE GIVEN RETROSPECTIVE EFFECT, WHICH STATUTE OF LIMITATIONS IS APPROPRIATE FOR THE COURT TO APPLY?

III

SHOULD THE DEFENDANTS' CONDUCT PREVENT THEM ASSERTING THE DEFENSE OF LIMITATIONS UNDER THE MARYLAND UNIFORM ARBITRATION ACT?

IV

IF THE THIRTY DAY LIMITATION PERIOD PROSCRIBED BY THE MARYLAND UNIFORM ARBITRATION ACT UNREASONABLY SHORT AND/OR IN VIOLATION OF THE DUE PROCESS OF LAWS UNDER THE FOURTEENTH AMENDMENT?

ARGUMENT

The thrust of the Defendants' argument for summary judgment is that the Plaintiff is time-barred from initiating his 301 suit by reason of the Supreme Court's ruling in the case of United Parcel Service, Inc. vs William Mitchell, 49 Law Week 4378, decided April 20, 1981, on the ground that the applicable Statute of Limitations is thirty days under the Maryland Uniform Arbitration Act (Courts and Judicial Proceedings Article 3-201, 3-234).

FACTS

On July 19, 1977, a hearing was held before an arbitral body consisting of an equal

number of representatives from the Union and the Company pursuant to the Labor Management Contract between Anchor Motor Freight and Local 557 (Labor Management Contract attached to pleadings), for the purpose of determining whether or not Philip Del Costello was unjustly discharged by the Defendant, Anchor Motor Freight. On that date the Eastern Conference decided that the termination of Del Costello's employment was appropriate and presumably mailed Mr. Del Costello a copy of this Decision which was received a day or two thereafter (copy of this Decision referred to as Exhibit 3 in Complaint is attached hereto and marked Plaintiff's Exhibit No. 2).

On August 19, 1977, Arthur Morningstar, who represented Mr. Del Costello on behalf of Local 557 at the Arbitration hearing mailed Mr. Del Costello a letter (a copy of which is attached and marked Exhibit No. 3), enclosing

the minutes of the hearing advising Mr. Del Costello that,"The enclosed minutes of the Eastern Conference (copy of which is attached and marked Exhibit No. 4) to be approved at the September 20, 1977, meeting of the Eastern Conference Joint Area Committee, and that if he (Del Costello) had any additions, deletions or corrections, to please put them in writing and send them to me immediately. Failure to do so will result in the minutes being approved." By letter of September 14, 1977 (copy of which is attached and marked Plaintiff's Exhibit No. 5), with a copy of Arthur Morningstar, Mr. Del Costello wrote the President of Local 557 a response to Morningstar's correspondence in which he addressed himself to what he regarded as the unfairness of the hearing as well as the subject of deletions, additions and corrections. On Page 76 of the Del Costello deposition (a copy of which is

Exhibit 6), Del Costello explained that his September 14, 1977, correspondence related to the inaccuracy of the minutes to the extent that the Company's main witness, Ellwood Feldman, Shop Supervisor, testified that he witnessed and observed Del Costello's refusal to drive a "safe truck". Because the Plaintiff had absolutely no contact with Mr. Feldman that day, he promptly advised Morningstar of this fact at the hearing, but Morningstar failed to object or ask the panel to postpone the hearing. According to the Del Costello Affidavit attached to this Memorandum (Plaintiff's Exhibit No. 7), the Plaintiff states that even though he was not completely satisfied with the manner in which Morningstar represented him at the hearing, he initially asked Morningstar to help him with his answer because of the belief that it was still possible for the Conference to reconsider

its Decision. However, when Morningstar refused to assist him and directed him to his "Communist friends in Prod", he contacted his previous counsel, Claude McKenzie, making inquiry as to what could be done, at which time McKenzie politely declined to help. Thereafter, on or about September 13, 1977, he contacted present counsel for advise and assistance regarding the preparation of the September 14 letter, which was never answered by his Local Union or the Eastern Conference. In late December, 1977, at a Union meeting, Del Costello asked Morningstar when the Sept. 14 letter would be answered, and Morningstar replied twice, "You got your answer." Del Costello concluded at that time that nothing more would be done by way of a re-hearing or otherwise. Thereafter, in late December of 1977, he requested present counsel to represent him. After conducting the appropriate

investigation suit was initiated on March 16, 1978, by the Plaintiff.

I

THE SUPREME COURT'S DECISION IN MITCHELL SHOULD BE GIVEN PROSPECTIVE EFFECT

The question of retrospective or prospective application of the State Statute of Limitations to an established Federal right was addressed in the case of Chevron Oil Co. vs Hudson, 404 U.S. 97, 92 Sup. Ct. 349 (1971), Stewart, J., which was strikingly similar to the Del Costello case. The Claimant, in Chevron, filed an Admiralty case alleging personal injury approximately two and a half years after the accident, at a time when a line of Federal Court Decisions interpreting the "Lands Act" held that under Admiralty Law the Statute of Limitations was more than one year. During the course of pre-trial discovery proceedings, the Supreme Court, in the case of

Rodrigu vs. Aetna Cas. Co., 395 U.S. 352 (89 Sup.Ct. 1835), held that:

> "State law remedies are not inconsistent with the applicable Federal Law and therefore the Federal Courts would apply the Statute of Limitations in the State where the injury occurred, namely, Louisiana, which was one year."

Accordingly, the District Court granted the Defendants' Motion for Summary Judgment on the ground that his cause of action was time barred by the Louisiana one year limitation.

Judge Stewart, on page 354 of the Chevron opinion, held that:

> "Although we hold that Louisiana's one year Statute of Limitations must be applied under the Lands Act as interpreted in Rodrigu, we do not blind ourselves to the fact that this is in relevant respect a pre-Rodrigu case. The Respondent's injury occurred more than three years before the announcement of our decision in Rodrigu. Yet, if Louisiana's Statute of Limitations controls in this case, his action was time barred more than two years before Rodrigu. In these circumstances we must consider the Respondent's argument that the Statute of Limitations should be given non-retroactive application under Rodrigu."

The Court went on to say, on Page 355:

"In our cases dealing with non-retroactive questions we have generally considered three separate factors: (1) The decision to be applied non-retroactively must establish a new principle of law either by overruling clear past precedent on which litigants have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. (2) It has been stressed that we must weigh the merits and demerits of each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Citing Linkletter vs Walker, 381 U.S. 639. (3) Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of non-retroactivity."

The Supreme Court related its reasons in support of prospective enforcement by stating:

"Upon consideration of each of these factors, we conclude that the Louisiana one year Statute of Limitations should not be applied retroactively in the present case. Rodrigu was not only a case of first impression in this Court under the Lands Act, but it also effectively overruled a long line of Decisions

by the Court of Appeals for the Fifth Circuit, holding that the Admiralty Law, including the doctrine of Laches, applied to the Lands Act. When the Respondent was injured, for the next two years until he instituted his law suit, and for the ensuing year of pre-trial proceedings, these Courts of Appeals Decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the Law as it was then. We should not indulge in the fiction that the law now announced has always been the law and, therefore, those who did not avail themselves of it waive their rights."

"To hold that the Respondent's law suit is retroactively time barred would be anomalous indeed. A primary purpose underlining the absorption of State law as Federal Law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies. Yet retroactive application of the Louisiana Statute of Limitations to this case would deprive the Respondents of any remedy whatsoever on the basis of superceding legal doctrine that was quite unforceeable. To abruptly terminate this lawsuit that has proceeded through lengthy and no doubt costly discovery stages for a year would surely be inimicable to the benificent purposes of Congress. It would also produce the most substantial and inequitable results,

citing Ciprioana vs City of Yuma, 395 U.S. 706, 89 Sup.Ct. 1900, to hold that the Respondent slept on his rights at a time when he could not have known the time limitations that the law imposes on him."

The Court went on to say:

"That certainly the Respondent's potential redress for his allegedly serious injury .... and injury that may significantly undercut his future earning power is entitled to similar protection."

The Court concluded by stating:

"Both the devotion to the underlined purpose of the Lands Act absorption of State Law, and a weighing of equities requires non-retroactive application of the State Statute of Limitations here."

The following Supreme Court cases have also addressed the Doctrine of Retroactivity:

Simpson vs Union Oil Co., 377 U.S. 13, 84 Sup.Ct. 1051; England vs Louisiana Medical Examiners, 375 U.S. 411, 84 Sup.Ct. 2161; Lemon vs Kurtzman, 93 Sup.Ct. 1463 (1973); Hanover Shoe vs United Machinery Corp., 392 U.S. 481, 88 Sup.Ct. 224 (1968).

Senior Judge Cowen of the Fourth Circuit had an opportunity to interpret the Chevron

criteria in a civil case in which the Appellants lost their jobs in Woodward Cullier, et al. vs Harper and Ramsey of the County of Lee, Virginia, 589 Fed. 2d. 753 (1978). In that case, Judge Cowen refused to apply the Supreme Court's Decision in Elrod vs Burns, 427 U.S. 347 (1976) retrospectively because the Supreme Court's Decision was not clearely foreshadowed and unquestionably overruled past precedent because the benefits to be gained by retrospective application were outweighed by the considerations of reliance, hardship and injustice as well as the impact on the administration of justice in the Circuit. The Court reached this result in part because Elrod overturned past precedents in the Fourth Circuit, and also because the adverse impact that retrospective application would have upon a large number of employees who would lose their jobs as well as the impact that retrospective

application would have upon currently pending cases.

Similarly, U.S. District Court in Virginia, in the case of Woods vs Safeway Stores, 420 Fed. Sup. 35 (1976), Mehridge, J., held that a Title 7 Complainant who filed a claim with EEOC beyond the 180 day period at a time when the settled law permitted the filing of a grievance under the Labor Management Contract to toll the 180 day limitations period was not time barred because of a subsequent non-tolling Supreme Court decision. The District Court applying Chevron ruled that the Supreme Court's non-tolling decision applied non-retroactively.

It is respectfully asserted that the standards governing non-retroactive application of the Statute of Limitations in Chevron cries out for prospective application of limitations in the Del Costello case,

irrespective of whether the limitations period is thirty days, three months or six months. It is obvious that the recent decision in Mitchell was definitely a case of first impression in the Supreme Court of the United States. Moreover, it is equally apparent that at the time that suit was initiated in Del Costello an overwhelming number of prior decisions, including the Courth Circuit, clearly established that the applicable Statute of Limitations for initiating a 301 Action against the Union for breach of its duty of fair representation, and against the Company for breach of contract, in circumstances where the combined conduct tainted the decision of the arbitral body was the general Statute of Limitations for either Torts or Contracts, and not the decisively shorter period of limitations set forth in the various State Statutes governing the vacating of arbitration awards.

In March of 1978, the Decisions governing the appropriate limitations period for the filing of a 301 Action, although diverse in their factual settings, sometimes involved a claim by the employee against the company and the union for breach of duty of fair representation and breach of contract, and on other occasions the suit was initiated against the union or the company only. Although many of these decisions challenged the failure of the union to pursue the grievance as the basis for the alleged breach of duty of fair representation, others attacked the quality of the representation of the employee before the arbitral body as the misconduct giving rise to the suit. However, the common thread running through all of these decisions commenced with an observation by the various courts that the absence of a specific limitation period in 29 U.S.C. 185, required the application of the

most closely anaolgous State Statute. This judicial inquiry described as the process of characteriation sometimes impelled the Courts to select the State Limitations period for the filing of Contract actions, and on other occasions resulted in the application of the general limitations period of Torts, put on all occasions Federal and State courts uniformly invoked lengthy limitation periods.

For example, the Supreme Court, in International Union United Auto vs Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107 (1966), promulgated the rationale of characterization for the selection of the appropriate State Statute to which the Circuit and District Courts referred for limitation purposes. The following citations constitute the line of cases upon which the Plaintiff had the right to rely at the time he initiated suit.

The Fourth Circuit, in Howard vs Aluminum,

589 F.2d 771 (1968) and Kennedy vs Wheeling Pittsburgh Steel Corp., 81 BNA-LLRM 2349 (1972), applied a five year State limitation period under the Hoosier rationale. See also Tomison vs Olga Coal Co., 335 F. Supp. 434, SPW Va. (1971), Tippett vs Liggett & Myers Tobacco Co., 316 F.Supp 292, N.D. N.C. (1970). Pittsburgh Steel involved a suit against the union for failure to process the Claimant's grievance and suit against the company for breach of contract. While the Arrington decision rendered by this Court and the case of Fox vs Local 557 (Y-80-5096), which rejected the arbitration limitations period,were decided after the Del Costello case was instituted, the selection of the general limitations period in those cases was based upon the rationale of other authorities preceding litigation in the instant case.

The following cases represent

substantially all of the decisions in other Circuit, District and State courts which similarly support the Plaintiff's contention of good faith reliance on past precedent as required by Chevron.

In Sanderson v. Ford Motor Co., 482 F.2d 1025, 5th Cir. (1973), in a 301 case by an employee against the Union for failure to file his grievance and against the Company for breach of contract, the Court applied the Alabama one year Statute of Limitations. Although the case did not proceed to arbitration, the facts indicate that the employee, company and union at first attempted to resolve the seniority dispute through written compromise. See also Tedford vs Peabody Coal Co., 383 F.Supp. 787 (1974), invoking the Alabama one year Statute of Limitations for Tort actions in a case where an employee whose grievance had proceeded to the third step in arbitration in

litigation against the Union and the Company. See also Engineers vs Mitchell, 190 F.2d 305, 5th Cir. (1955).

In Bruen vs Local 492, 313 F.Supp. 387, D.C. N.J. (1969), it involved a suit by an employee against the Union and the Company arising out of an alleged arbitrary removal of the Plaintiff's name from the seniority lists. The Court applied the six year State Statute of Limitations for Contracts and Torts under the Hoosier rationale. Reversed on other grounds, Bruen vs Local 492, 425 F.2d 190 (1970). See also Falsetti vs Local Union 2026, United Mine Workers Union, 355 F.2d 658 (1966), and Marshall vs Electric Hose & Rubber Co., 68 F.R.D. 287, D.C. Del. (1975).

The First Circuit in De Arroyo vs Sindicato De Trabajadores Packing House, 425 F.2d 281, 1st Cir. (1970) Cert. denied, 91 S.Ct. 117, 121, 863 (1972, 1973), applied the one

year State Statute of Limitations for Torts rather than the longer Statute for Contracts in a suit involving the Union's failure to file a grievance attacking the employee's discharge.

The Court's analysis in the context of the Hoosier rationale provided critical guidelines to which other Circuit and District Courts often relied upon and to which they often referred in their analysis of limitations questions.

On Page 287 of the Opinion, Judge Coffin stated:

> "I think the logic of Hoosier Corp. dictates the adoption of express State Statute of Limitations in the absence of an express Federal Limitations period."
>
> "We detect in Hoosier a distinct preference for the shorter period of limitations where the question of characterization is a close one (where choices between the selection of contract or tort limitation period), and no manifest injustice results from such choice which preference suggests the tort limitations period is most judicious."
>
> "The question becomes whether there

is any express Federal limitations period governing an action against a Union for breach of duty of fair representation."

"Since the Union's breach may be an unfair labor practice, the statutory six month limitation period for such practices, 29 U.S.C. 160(b) could be deemed applicable to an employee's suit against the Union."

"However, since Vaca vs Sypes established Federal Labor policy does not require that the individual suit be preempted simply because the NLRB might also be able to prosecute the union for such conduct, we see no reason why such private litigation be limited by the same period as the NLRB is. By giving the individual employees a longer period than the NLRB's six months, WE ENCOURAGE INITIAL RECOURSE TO THE BOARD WITHOUT PRECLUDING SUBSEQUENT CIVIL SUITS IF THE BOARD REFUSES TO PURSUE THE MATTER FOR THE INDIVIDUAL. Moreover, the individual suit is still analogous to an ordinary Tort action regardless of the Board's concurrent jurisdiction."

The Federal District Court of Maine in Sciaraffa vs Oxford Paper Co., D.C. Maine 310 F.Supp. 891 (1970), held that a discharge case involving 60 women was not barred by the NLRB limitations period of sixty days, since the six

year Statute of Limitations of Maine was applicable. See also International Longshoremen's Assn. vs Sealand Service, D.C. Puerto Rico, 430 F. Supp. 282 (1975), holding ten year limitation period applicable.

Although the ninth Circuit in the case of Fichback vs Moore, Inc., 350 F.2d 935 (1965), held California's three year Statute of Limitations to be applicable by analogy in a 303 case against the union and not the NLRB six month period, the California Supreme Court in 1977 in the case of Lento vs Underground Construction Co., 69 Cal. App. 3rd 933, spoke definitively to the limitations question in a case by an employee against the union, the union's lawyer and the company following an adverse arbitration decision.

Relying upon the Supreme Court's Decision in Hines vs Anchor Motor Freight, 424 U.S. 554, 96 S.Ct. 1048, Dec. 1946 (which also

involved a 301 action filed more than a year after an adverse arbitration).

The California Court held that the one hundred day California arbitration statute (otherwise applicable to awards procured by fraud and corruption) could not be employed to preclude a suit against the employer and the union when it is alleged that the award was the product of dishonest, bad faith representation. There the union has breached the duty of fair representation, the Court opined, and the policy of promoting finality of the arbitration award does not preclude a judicial action by the employee to enforce the bargaining agreement. Since Hines was commenced well after the limitations period for commencement of actions to vacate the award, this suit need not be commenced within the arbitration statute of limitations of one hundred days, but would be governed by the normal statute of limitations

for actions on contract, fraud and deceit.

The Eighth Circuit, in Butler vs International Brotherhood of Teamsters (514 F.2d 442, CA 8 Cir. 1975, 423 U.S. 924,(Cert. denied 1976), decided that the State limitation period of five years is applied under the Hoosier rationale to the case of an employee who was suing the union for breach of duty of fair representation and the company for breach of contract following an adverse arbitral hearing. In this case the Butler Court analyzed the character of the action for limitation purposes citing other Circuit Court decisions which similarly address themselves to the limitations question. De Arroyo vs Sindicato De Trabajadores Packing House, First Circuit; Sanderson vs Ford Motor Co., Fifth Circuit; Abrams vs Carrier Corp., 434 F.2d 1251, 2nd Cir. See also Warren vs IBT, 554 F.2d 334, 8th Cir.(1976), Mikelson vs Wisconsin Bridge Co., D.C.Wisc.354

F.Supp. 444; Tully vs Fred Olsen Motor Service, 27 Wis.2d 476, 134 N.W.2d 393, holding State Limitations period of six years applicable in a 185 action against the Union and Company, and not six month NLRB Statute under 2290 U.S.C. A 160(b). See also St. Louis Typophical Union vs Herrald Co. D.C. M.O. 277 F.Supp. 276, Affd. C.A. 8, 402 F.2d 553; see also Grant vs Mulvihill, 428 F.Supp. 45 (1976), involving action against Company and Union holding Contract Limitation Period applies.

In the case of Bucholtz vs Swift, 62 F.R.D. 581 (1973), a Minnesota District Court similarly held that suit by an employee against his Union and the Company was governed by the Minnesota Statute of Limitations for Contracts or Torts. This election process by the Court impelled the Bucholtz Court to observe that

> "While there is a split of authority in connection with the contract or tort preference, though breach of duty may be an unfair labor practice, the six month

NLRB rule is not controlling."

See also Harmon vs Martin Bros., 227 F. Supp. D.C. Ore. (1964), holding six month NLRB limitation to be inapplicable as a result of which the State Statute of Limitations period was applied. See also Health Beneficial Trust Fund vs Domes Insulation Co., 387 F.Supp. 144 (1975), applying Colorado six year Statute of Limitations to a 1985 case under 29 U.S.C. 185, as not unreasonable or contrary to National Federal Labor Policy.

The Sixth Circuit held, in Smart v. Ellis, 580 F.2d 215, 6th Cir., decided July 1978, 96 S.Ct. 1497 (1979), that the District Court decision in that case, reported in 409 F.Supp. 129, Eastern Dist. Michigan (1976), applying the contract and not the State Arbitration Limitation period was generally correct. See also Glowacki vs Motor Wheel Corp., 67 Mich. App. 241 N.W. 2d 240 (1976); Field vs Local

652, 148 N.W. 2d 552 (1967), holding 20 day Michigan arbitration statute of limitations and Federal Arbitration Statute of Limitations inapplicable to 301 cases. See also International Association of Heat and Frost Insulators and Asbestos Workers Local, 416 F.2d 313 (1969), 6th Cir.

In the Second Circuit Abrams vs Carrier Corp., 434 F.2d 1234 (1970), New York's six year statute of limitations for contracts was applied to a 301 case against the company and the union arising out of the Union's refusal to pursue the employee's grievance. Subsequent to the initiation of the Del Costello case, the Second Circuit in Mitchell vs United Parcel Service, Inc., 624 F.2d 394, 2nd Cir. (1980), rejected the New York State Arbitration limitations period of ninety days, holding that the New York six year Statute of Limitations applied to a 301 suit of an employee against the

union and the company following an unsuccessful arbitration decision. Although there do not appear to be any Federal Circuit cases which apply the short arbitration statute of limitations in 301 cases at the time that the instant case was filed, there are several Federal District Court cases which apparently did invoke the "arbitral limitations period".

The United States District Court for the Northern District of New York, in the case of Barbarino vs Anchor Motor Freight, 94 LRRM 2369 (1976), held that the ninety day New York Arbitration Statute, rather than the general statute of limitations, precluded the Plaintiff's recovery. This Court distinguished the present action from the case of Abrams vs Carrier Corp., supra, on the ground that Abrams did not involve a previous arbitration award.

See also De Lorto vs United Parcel Service, 401 F. Supp. 408 (1975); U.M.W. vs Jones

and Laughlin Steel Corp., 378 F.Supp. 1206; International Brotherhood of Teamsters Local 249 vs Motor Freight Express, Inc., 356 F.Supp. 724, West.Dist.Pa. (1973); Hanna Heating & AC Co., Inc. vs Sheet Metal Workers Local, 378 F.Supp. 1001, S.D. N.Y. (1974); Luncford vs Western Conference of Teamsters, CCH, D.C. 74 Labor cases, Cal. (1971). See also Wallace vs American Telephone & Telegraph Co., 460 F.Supp. 755 (decided April 25, 1978, after Del Costello).

The Barbarino distinction between arbitral award litigation and a suit emanating from failure to pursue a grievance as addressed by Abrams, when viewed prospectively for limitation purposes, did not in any manner foreshadow the result in Mitchell for several reasons.

First, the footnote in Abrams[1] to the

[1]It is again to be emphasized, however, that it does not follow that limitations

effect that the Abrams Court declined to render a comprehensive decision for limitations purposes as stated in the context of choosing between a contract or tort classification, both of which tended to invoke the long statute of limitations. There was no hint or indication by the Abrams Court in their note analysis that the arbitral New York limitations period, or

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[1] (Continued)
period for breach of contract related claims will apply to all suits brought against a Union by a disgruntled employee which are nominally classified as within the fair representation rubric. In each instance the nature of the alleged act of commission or omission on the part of the Defendant Union must be examined to determine Federal characterizations for statute of limitations purposes; we therefore express no opinion as to whether, given allegations other than the Union for refusal to enforce the employee's contract rights, we might adopt the statutory duty characterication of Gray vs International Association of Heat & Frost Insulators, 416 F.2d 313, 6th Cir. The tort characterization of De Arroyo vs Sindicato De Trabajadores Packing House, 425 F.2d 281, 1st Cir. (1970), or some other classification.

any other short statute as being considered. Furthermore, when the Second Circuit decided the Mitchell case they cited Abrams as authority for their rejection of the New York ninety day limitation period. Secondly, the Mitchell Supreme Court selection of New York's ninety day Statute of Limitations, rather than the six year period, was predicated upon a policy favoring expeditious resolution of grievances in order to preserve the arbitral process and the law of the shop from disruptive changes many years later. Hoosier and all other Circuit, District and State authorities were flatly and unforseeably overruled. The Supreme Court, unlike Barbarino, and the few scattered District cases invoking the short arbitral statute made no distinction between the cases involving arbitral decisions and those pertaining to unfiled grievances as the legal justification for the selection of the short limitation

period. Surely the Mitchell court did not intend, nor can the Defendants contend, that a 301 Plaintiff who pursues his case to arbitration is bound by the thirty day Maryland Arbitration Statute, whereas a 301 Plaintiff to whom arbitration is unjustly denied, is foverned by the three year general statute of limitations for contracts or torts. If such an anamolous construction finds no support in Mitchell, the arbitral distinction theory in Barbarino viewed prospectively did not logically portend a sweeping change that is now the law.

Lemon vs Kurtzaman, 411 U.S. 192; 93 S. Ct. 1463 (1973), in addressing the issue of prospective application in another context, observed:

> "Statutory or even Judge-made rules of law are hard facts on which people must rely in making decisions, and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing the Doctrine of Retroactivity."

Consequently, when the Plaintiff initiated suit on March 17, 1978 (approximately seven and one-half months from the decision of the Eastern Conference of July 19, 1977, six and one-half months from the deletions and corrections letter of Arthur Morningstar of August 19, 1977; five and one-half months from unanswered reply to 557 of September 14, 1977, regarding the objections to the decision of the Eastern Conference and the accompanying documents otherwise known as minutes) a clear and overwhelming line of Federal and State authorities in the Fourth Circuit and throughout the Country, all of which were overruled by Mitchell, indicated that he had three years within which to initiate his action.

It is obvious that at that time counsel for both Defendants were similarly persuaded that the Plaintiff's action was not time-barred by any thirty, ninety or one hundred and eighty

day limitation period. It is equally apparent from the face of the Bill of Complaint filed on March 16, 1978, containing a copy of the Eastern Conference decision of July 19, 1977, and the date that suit was instituted on March 16, 1978, that more than six months elapsed. Nevertheless, Local 557, which now raised the sword of counsel fees as the price for the Plaintiff's refusal to voluntarily dismiss his action in the light of Mitchell (See exchange of correspondence between counsel, Exhibit No. 7), Local 557 thought so much of the defense of limitations that they failed to affirmatively plead that defense in their Answer to the Bill of Complaint on April 10, 1978, in contravention of Federal Rule 8(c). Ironically, the Federal decisions interpreting the failure of the Defendant to affirmatively assert the defense of limitations in their Answer seems to insulate them from an attack of waiver by

permitting the limitations question to be raised by a Motion for Summary Judgment as long as failure to comply with the applicable period of limitations is apparent from the face of the Complaint.

Nevertheless, while the Defendant, Anchor, did comply with Federal Rule 8(c) by raising the defense of limitations in their Answer to the Plaintiff's Complaint, neither Defendant seriously or expeditiously raised the question of limitations until the filing of their Motions for Summary Judgment in February of 1981, at a time when the issue of arbitral limitations had already been argued before the Supreme Court. Accordingly, it is only fair to suggest that both Plaintiff and Defendants in the instant case honestly and reasonably relied upon past precedent, which clearly indicated that the Plaintiff had three years within which to initiate this lawsuit.

It is also apparent that when the Plaintiff filed suit on March 16, 1978, the action was timely under every decision rendered in the Fourth Circuit covering fair representation suits as well as under every single precedent cited, which Mitchell overruled. In fact, the Supreme Court previously denied a Writ of Certiorari when the question of arbitral limitations for fair representation suits was raised in the case of Smart vs Ellis Trucking, supra. Until the Supreme Court addressed the question in Mitchell the State arbitration limitations period as a proper Statute was either rejected or not considered in every single decision previously cited. There was no logical or legitimate warning that a State arbitration law would be the appropriate Statute, and for these reasons the good faith reliance test under Chevron is satisfied.

The second standard enunciated in Chevron

requires the Court to weigh the merits or demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. The prior history of the applicable limitations to 301 cases has been to permit the initiation of suit within a period of three years, as provided by the Maryland Code in Courts and Judicial Proceedings Article 5-101.

In Mitchell, Judge Rehnquist observed:

> It is important to bear in mind the observations made in Steelworkers triology that the grievance machinery under a collective bargaining agreement is at the very heart of a system of industrial self-government ..... the processing machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. Although the present case involves a fairly mundane and discreet wrongful discharge complaint, the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective bargaining agreement affecting the entire relationship between company and union. See Humphrey vs

Moore, 375 U.S. 335 (seniority rights of all employees). This system, with its heavy emphasis on grievance arbitration and the law of the shop, easily becomes unworkable if a decision which has given meaning and content to the terms of an agreement, and even affected subsequent modifications of the agreement, would suddenly be called into question as much as six years later."

Clearly, the Mitchell Court was not concerned with the simple discharge of the litigant, but promulgated a new rule, or more appropriately, a national policy that would expedite the trial of 301 cases involving substantial numbers of employees whose rights and duties were governed by the law of the shop in a manner that would insulate the arbitral process from the disruptive effects of radical change many years later.

The Plaintiff's action in the instant case, like Mitchell, involves a fairly mundane and discreet wrongful discharge complaint filed at most seven and one-half months after the arbitral decision of the Eastern Conference of

July 19, 1977. White it is conceivable that a successful conclusion of the Del Costello case may establish a clarification in the decisional precedents pertaining to breach of duty of fair representation, it is obvious that entire classes of employees under the Labor Management Contract will not be affected in their seniority or other rights if this Court permitted Del Costello to be tried. Moreover, the Plaintiff has initiated suit under a Labor Management Contract which has since expired (See Labor Management Contract, 1976-1979), thereby even further limiting the possible impact that a continuation of this litigation may have. Accordingly, non-retrospective application of the thirty day Statute of Limitations will not operate in a manner that would conflict with the purpose for which the new rule was designed. Nor, will it impair the stability in the law that the new rule seeks to preserve.

The third and final standard established in Chevron requires a weighing of the inequity imposed by retroactive application against the prospect of avoiding hardship and injustice by holding that the new rule is prospective. From July 19, 1977, the date of the arbitration decision to March 16, 1978, until the decision in Mitchell on April 20, 1981, the Plaintiff, the courts, including this Court, and even the Defendants despite possible tongue-in-cheek arguments to the contrary in February, 1981, all reasonably relied upon the notion that the three year limitations period was applicable until the Mitchell case, in accordion-like fashion, reduced three years to thirty days. To suggest that the Plaintiff's cause of action should now be equeezed to the point of extinction by the retrospective and mechanical application of a vise-like thirty day rule under a fictitious theory that the law now

announced has always been the law overlooks the fact that the new rule was not designed to abrogate substantive rights of Plaintiffs established by Congress in 301 cases, but was indeed fashioned as national policy to expedite the litigation in a manner that would preserve the integrity of the arbitral process. With reasonable, if not detrimental reliance upon the old rule, the Plaintiff, Del Costello, following receipt of the decision from the Eastern Conference of July 19, 1977, upholding the discharge, received a letter from Morningstar on August 20, 1977, seeking additions, corrections and deletions from the Eastern Conference minutes on or before September 20, 1977, to wh ich the Plaintiff responded, with assistance of counsel, by his letter of September 14, 1977, which was never answered by the Union or by the Eastern Conference. This course of dealings between the Plaintiff and

Morningstar, who was a member of the Eastern Conference in cases in which 557 is not a party, at the very least indicated to the Plaintiff that even if his quest for reinstatement might turn out as an exercise in wishful thinking, there were nevertheless, procedural steps remaining before the arbitral decision became absolutely "final". After the Defendant, Local 557, and the Eastern Conference failed to reply to his letter of September 14, 1977, containing additions, corrections and complaints, Del Costello contacted counsel in December of 1977 and after the appropriate legal research and inquiry into the factual background surrounding the claim, counsel of record was retained on March 9, 1978, and initiated suit on March 16, 1978, entertaining at the time the reasonable belief that the cause of action was not time barred. Thereafter, counsel for all the parties engaged in extensive pre-trial discovery

which has not yet been concluded.

Suffice it to say that it would produce the most substantial inequitable results to hold that Del Costello slept on his rights at a time when he could not have known the time limitation that the law imposed upon him.

Accordingly, the Plaintiff respectfully requests that this Court apply the limitations period enunciated in Mitchell prospectively.

II

ASSUMING ARGUENDO THAT MITCHELL SHOULD BE GIVEN RETROSPECTIVE APPLICATION, WHICH STATUTE OF LIMITATIONS IS APPROPRIATE FOR THE COURT TO APPLY?

If this Court decides that the Mitchell decision operates to apply the Statute of Limitations retrospectively, this Court has the further obligation of determining whether the New Jersey or the Maryland Uniform Arbitration Acts are applicable.

As the Defendants have suggested, the Maryland Law Encyclopedia on Limitations of Actions, page 315, provides:

> "The law of the forum State is generally the one that governs the appropriate Statute of Limitations."

In addition, in the Annotated Code of Maryland, Courts and Judicial Proceedings Article, Section 3-202, the legislature amended the jurisdictional section which previously took jurisdiction over awards rendered in this State. In fact, in Security Construction vs Maietta Tavelino Corp., 25 Md. App 303; 334 A. 2d 133 (1975), the Court of Special Appeals determined that an arbitration award made outside of the State of Maryland (Philadelphia) had to be vacated in the thirty days pursuant to the Maryland Annotated Code, Courts and Judicial Proceedings Article, Sections 3-224.

Since the Plaintiff, Local 557 and Anchor Motor Freight are all located in the State of

Maryland where the action arose, the New Jersey Courts do not have jurisdiction or venue over the party. Therefore, the Maryland Uniform Arbitration or the National Labor Relations Act are the appropriate Statutes to apply, if any.

III

THE STATUTE OF LIMITATIONS IN THE MARYLAND UNIFORM ARBITRATION ACT WAS TOLLED BY THE COURSE OF DEALINGS BETWEEN THE PLAINTIFF AND LOCAL 557 FOLLOWING THE EASTERN CONFERENCE DECISION OF JULY 19, 1977.

Business Agent Arthur Morningstar, who represented the Plaintiff before the Eastern Conference Arbitration Committee on July 19, 1977, according to testimony of Daniel Sandy, company representative (page 15 of his testimony) stated that Morningstar has been a member of that arbitral body since 1970, and has sat as a panel member and decided numerous discharge cases as a member of various panels

composed of an equal number of Company and Union representatives in circumstances where his own Local was not a party to the proceedings. On August 20, 1977, Morningstar wrote the Plaintiff a letter advising him that he had thirty days, or until September 20, 1977, within which to make any additions, deletions or corrections to the conference minutes which presumably constituted the basis by which the July conference panel rendered its decision. The Plaintiff complied with this request by mailing a letter to Duke O'Connor, President of Local 557, with a copy to Arthur Morningstar, in which he attacked the substance as well as the accuracy of the minutes and the award. Neither Local 557 or any representative of the Eastern Conference ever responded to Del Costello's letter of September 14, 1977 (see Del Costello Affidavit). For that reason the award of the Eastern Conference of July 19,

1977, never attained the degree of finality sufficient to commence the running of any limitations period.

In Smart vs Ellis Trucking, 409 F.Supp. 129 (1976), affd. 580 F.2d 215, 6th Cir.(1978), the District Court held that the Michigan Arbitration Statute which is identical to the Maryland Uniform Arbitration Act (because both are based on the Uniform Arbitration Act), would be tolled when the Plaintiff moved for a rehearing. In Smart, supra, the award was made in January, 1971, but did not become final until April, 1971, when the Arbitration panel denied the request for rehearing. The Plaintiff's letter to Morningstar, in his capacity as an Agent of the Eastern Conference, was tantamount to a request for a rehearing because it attacked the use of Ellwood Feldman's testimony which was impermissible under the rules and regulations of the Eastern Conference.

Daniel Sandy, in his deposition (18-50 appended), testified that failure to disclose vital evidence precluded its introduction at the hearing. Moreover, while the Committee hearings are not governed by technical rules of evidence similar to those which exist in Courts of Law, there are nevertheless, basic evidentiary rules with which each side must comply. For example, evidence concerning first hand factual observations of an individual must be introduced by a live witness having personal knowledge, or through his written statement or under Affidavit. An individual witness is not allowed to testify as to what another party saw or heard (Daniel Sandy Deposition, Pages 22, 23, 24).

Documentary evidence, however, such as letters, dock repair orders, pictures, etc., may be fairly introduced (Sandy Deposition, pages 21, 22, 23). At the Eastern Conference

hearing Daniel Sandy told the Committee in his opening statement what he intended to prove concerning the discharge (see Minutes, Exhibit No. 4).

Although the notes of the minutes of the E.C. hearing do not reflect precisely what, if anything, Ellwood Feldman said as a witness for the Company, and Daniel Sandy, at the time of his deposition (page 88), conveniently forgot what his principal witness related to the arbitral body, it is Del Costello's contention (see Del Costello's deposition (pages 65-66, 75-76), that Feldman testified that he was the one who had the "confrontation" with Del Costello, and commenced to relate the details of that confrontation concerning the Del Costello refusal to drive the "safe truck" on the date of his discharge. After hearing the beginning of this testimony at the Eastern Conference, Del Costello promptly told Morningstar

that Feldman was not there the day he was discharged, and that he did not talk to him, after which Morningstar not only failed to object to this excludable hearsay but simply admonished the Plaintiff to be quiet, "Shut up and don't be ignorant like they are" (Del Costello deposition, pages 75, 76). If the false testimony of Feldman was objected to and excluded as it should have been under the evidentiary rules of the Eastern Conference, Anchor would have failed to meet its burden of proof as required by the Conference rules (see Sandy deposition, pages 15, 16), because there was absolutely no testimony up to that point of Del Costello's refusal to drive a truck. While it is true that Anchor two years later alleges that they did comply with the Conference Evidentiary Rules by introducing the Affidavit of John Omeline who stated therein that he was the party to whom Del Costello

communicated his refusal to drive the truck, there was no mention of that fact in any portion of the minutes of the Eastern Conference Decision. Furthermore, Del Costello's contention that Omeline's statement was never introduced is corroborated by 557's answer to question 16 of the Plaintiff's interrogatories signed under Affidavit by Morningstar on behalf of Local 557 on September 6, 1978.

In pertinent part, question 16 asks:

> "On July 19, 1977, at the Eastern Conference Automobile Joint Committee, did the Company, Anchor Motor Freight, the International Brotherhood of Teamsters, etc., and/or Local 557, produce any written or oral statements of persons not present?"
>
> Answer: "No."

Consequently, Morningstar, in his ficuciary capacity as a representative of Del

Costello and as a knowledgeable member of and agent for the Eastern Conference arbitral body was obligated to treat the Del Costello September 14, 1977, letter as a request for a rehearing, and at the very least, Del Costello was entitled to receive correspondence from either Morningstar or the Eastern Conference that his request for a hearing was denied as a condition precedent to the finality of the conference decision and the running of the Statute of Limitations. Since Del Costello never received a reply to his September 14 letter, the limitations proscribed by the Maryland Uniform Limitations Act was tolled until such time as the Eastern Conference formally ruled upon the Plaintiff's request.

If Mitchell is to be construed and applied so as to mandate the initiation of a suit within thirty, ninety or one hundred and eighty days, whichever be the case, from the arbitration

decision of July 19, 1977, in order to preserve the integrity of the arbitral process, the arbitral body, through its authorized agents, are similarly obligated to follow its own rules of procedure by clear unequivocal written notification to the Plaintiff advising him of exactly when their decision was final and binding. To permit Morningstar to tinker with the arbitral procedures and string Del Costello along by creating the impression that the Decision is yet to be corrected, and thereby ignore his duty to seek reconsideration and at the same time permit the Defendants in this case to invoke a short Statute of Limitations on the ground that Del Costello's lawsuit is time barred, operates to convert the defense of limitations into a sword as well as a shield.

Furthermore, a mere request for reconsideration will toll the Statute of Limitations under the Uniform Arbitration Laws until such

time as the arbitrator denies a request for reconsideration. Under the decision rendered in Gas Workers Local No. 380 vs Michigan Consolidated Gas, 503 F. Supp. 155 (1980), the Maryland Uniform Arbitration Act, and for that matter any other limitation period was tolled, and the Statute of Limitations did not begin to run in the instant case by reason of the failure of the Eastern Conference directly, or through its aughorized agent, to provide the Plaintiff with any response. In Tucker v. Owen, 94 F. 2d 49, 4th Cir. (1937), the Fourth Circuit held that a Defendant who negligently or intentionally misleads a Plaintiff by its representation, causing him to delay suing until the statutory bar has fallen, will be estopped from pleading the Statute of Limitations.

IV

THE MARYLAND UNIFORM ARBITRATION ACT IS UNCONSTITUTIONAL BECAUSE IT VIOLATES DUE PROCESS AND IS OTHERWISE UNREASONABLY SHORT

The United States Arbitration Act enables individuals to vacate an award within ninety days. The New York Statute of Limitations similarly provides for a ninety day period. Yet the Maryland Act only provides a thirty day period. (Courts and Judicial Proceedings Article of the Annotated Code of Maryland, Section 3-224). It is well established that a limitation statute is unreasonable if it does not afford full opportunity to sue before the bar takes effect, and that the Legislature does not have the power to cut off an existing remedy entirely since this would amount to a denial of justice. Consequently, it is firmly established that when a new limitation is made to apply to existing rights or causes of actions,

a reasonable time in which such rights may be asserted, or in which suit may be brought on such causes of actions, suit must be allowed before the limitation takes effect, and that a limitation statute is void if the period allowed is unreasonably short.

51 ALR 2d, Section 31, page 615, Atchafalava Land Co. vs F. B. Williams Cypress Co., 258 U.S. 190, 42 S.Ct. 284, 185 U.S. 55, 22 S. Ct. 573; Edwards vs Kearzey, 96 U.S. 595, 24 L.Ed. 793.

While it is clear that Mitchell sanctions the New York ninety day limitation period in 301 cases, it is respectfully suggested that the thirty day limitation period in Maryland is an unreasonably short time bar. This proposition is supported by the concurring opinions in Mitchell which would establish a national six month period of limitations for the filing of 301 actions. The Mitchell

court (page 4379, footnote 2) stated that they declined to consider the six month limitation period because the Respondent filed his claim beyond the six month period and therefore the issue is not before them, and in any event, the Claimant would be barred even if the six month period were the Law. While it would be presumptuous to expect this Court to promulgate a new national policy establishing six month limitations for all 301 actions, it is quite appropriate for the Plaintiff to assert that the thirty day limitation period is unreasonably short. Appeals in the State of Maryland under a variety of rules and regulations provide thirty days within which counsel may appeal from adverse Court and Administrative Decisions in circumstances where counsel has unsuccessfully represented the litigant. In all of these proceedings, including matters under the Maryland Arbitration Act, counsel

for the litigant presumably has been retained and has searched the law and investigated the facts long before the adverse Court or Arbitration Decision, as a result of which the litigant's case requires no more than perfunctory filing of an Appeal by counsel which, in practical terms, involves minutes to hours in order to preserve the rights of the client. However, the 301 action is an entirely different species of litigation. Under the Labor Management Contract and Rules or Procedures of the Eastern Conference and Teamster Constitution, a lawyer is absolutely prohibited from representing a Claiment before the Arbitration Committee of the Eastern Conference. (Union Company Contract, Page 9, Article 3, Section a) The rules of Procedure prohibit any party unassociated with either the Company or the Union, for a period of eighteen months, to represent either the Company or the Union at a

discharge hearing. The rationale of lawyer exclusion was to expedite discharge cases at minimum costs which, of course, expose the arbitral process to the evils of horse trading and deals which many scholars in Labor Law believe rampant in the Teamster arbitral process. See the following Law Review Article:

> 51 Texas Law Review, Page 1170, Duty of Fair Representation, theoretical structure by Julia P. Clark.

For all intents and purposes, the discharged employee is bound to accept his duly appointed business agent as his representative. Consequently, from a legal as well as practical standpoint, the employee must rely upon the business agent to investigate the facts of his case, prepare a defense, and thereafter argue on his behalf at the arbitral hearing. Under these circumstances, it is not unreasonable to expect that more than thirty days may elaps before the discharged employee realizes that his

fiduciary did not represent him fairly under the applicable Court decisions. In the Del Costello case, this skepticism induced the Plaintiff to contact present counsel in September of 1977, after Morningstar refused to assist him with the preparation of the Morningstar deletion and correction letter of August 20, 1977. Even on that late date it would have been manifestly unfair for the Law to impose upon present counsel the Hobson's Choice of running the risk of initiating a frivolous lawsuit if he did file suit, or running the risk of being time barred by the thirty day statute of limitations if he declined to file suit until an investigation into the merits of the claim indicated that the employee had a case. Furthermore, present counsel's choice was generally based upon the aforementioned authorities calling for a three year limitation period, but was precluded from initiating suit on an

earlier date because of the complexity of the issues and facts that the Del Costello determination raised. Before undertaking this litigation he also was required to make inquiry into the Federal Substantive Law, the Union Management Contract, the Local Rider, Customs and Practices at Anchor and Local 557, Shop Law, and interviews with numerous witnesses conversant with these practices and, more particularly, with the facts of the case, all of which took appreciably more than thirty days, or for that matter ninety days.

Finally, it is respectfully suggested that the application of the Maryland thirty day period to the Del Costello claim would have precluded suit on August 20, 1977, on the very day that he received the deletions and corrections letter from Arthur Morningstar. Consequently, the thirty day time bar would operate to vitiate the Claimant's procedural

rights to reconsideration but, in addition, would unreasonably abort Del Costello's substantive rights under Section 185. In August, 1977, no Federal or State construction of the facts and circumstances would rationally demonstrate that Del Costello had a stale claim.

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III

THE SIX MONTH LIMITATIONS PERIOD OF THE NATIONAL LABOR RELATIONS ACT SHOULD BE ADOPTED BY THIS CIRCUIT.

Del Costello contends that the six month limitations period delineated in the National Labor Relations Act, Title 29 U.S.C. §160 (b), is the appropriate limitations period applicable to both the company and the union. Since the court below found that there was sufficient evidence in the record to indicate that the limitations period did not begin to run until December of 1977 (App. 18, 111; Court's Opinion and Affidavit), the present action was filed well within the six month period and is not time-barred.

At the outset, it must be stated that Justice Rehnquist, in United Parcel Service v. Mitchell, 101 S.Ct. 1559, 1562, 1563, observed in footnote 2 of that decision:

> "The AFL-CIO has filed a brief arguing that in cases such as the present one, the court should apply the six month limitations period of 10 (b) of the National Labor Relations Act, Title 29 U.S.C., §160 (b). We decline to consider this argument, since it was not raised here or below."

More importantly, Justice Stewart, author of Hoosier Cardinal, supra, in his concurring opinion in Mitchell, together with other members of the Supreme Court, argued persuasively for a national limitations period of six months in all cases where the union and the company are joined. As a matter of fact, five of the nine justices who decided the Mitchell case at one time or another favored a federally created uniform limitations period. (See Hoosier - Cardinal, dissenting opinion, White, J., 383 U.S. 709, and United Parcel Service v. Mitchell, supra, concurring opinion, Stewart, J., Stevens, J., and Blackmun, J.)

The primary reason why this Court should

adopt the six month limitations period is that a breach of duty of fair representation is also an unfair labor practice under the National Labor Relations Act, to which Congress has affixed a limitations period of six months, which can not be shortened by applying a thirty day Maryland arbitral statute to the concurrent breach of contract action. See McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1957), and Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978). Significantly, both the Supreme Court, as well as the Fourth Circuit, have held that a breach of duty of fair representation is an unfair labor practice. See Justice White's opinion in Vaca v. Sipes and Newport News Shipping Co., NLRB 631 F.2d 263 (1981).

Faced with a similar problem involving two interrelated causes of action calling for the application of two limitations periods, the first, under the doctrine of unseaworthiness,

involving a state limitations period under the Jones Act, the Supreme Court, in McAllister v. Magnolia Petroleum Co., supra, held that:

> "An action for unseaworthiness is combined with an action under the Jones Act, and therefore a court can not apply a shorter statute of limitations than Congress has prescribed for the latter. We think this is so whether the action is raised at law or admiralty in the state or the federal courts."

The McAllister court thereafter applied the longer federal limitations period of the Jones Act to both causes of action.

Fulfillment of the Supreme Court's policy of rapid resolution of labor disputes could be enhanced by the adoption of the six month period of the NLRA in the Fourth Circuit because the State of Virginia does not have a time limitation in his arbitral statute. (See Virginia Annotated Code, 8-01-577, 8-01-581; 1981 ed.) As a result, courts in Virginia, under the present law, would be obligated to

adopt either the tort/contract statute, neither of which provides rapid resolution of labor disputes because they call for time limitations of two and three years, respectively. (See Virginia Annotated Code, 8-01-243 and 8-01-246; 1981 ed.)

Similarly, West Virginia also fails to provide an arbitral time limitations period. (See West Virginia Annotated Code, 55-10-4 through 55-10-6) A West Virginia 301 litigant would also be bound by the long contract or tort statute, which provides several years within which an action may be instituted. (See West Virginia Annotated Code, 55-2-12)

The State of South Carolina has expressly declared that their arbitration statute is not applicable to labor disputes. (South Caroline Annotated Code, 15-48-10 (2) 1980 ed.) This state provides the analogous time limitation of six years for contracts and seven years

for most tort actions. (See South Carolina Code, 1980, §153.3.550)

However, the Ninth Carolina arbitral statute provides for a ninety day period within which to vacate an award. (See General Statutes for North Carolina, 1.578-13, 1977 Cum. Supp.)

As a consequence, the time periods in the Fourth Circuit range from thirty days, as in the State of Maryland, to as much as six to ten years in other states in this circuit, which hardly promotes rapid resolution of labor disputes. Furthermore, strict adherence to the lower courts' acceptance of the Barbarino distinction calling for the application of contract/tort statutes in all non-arbitral cases and the thirty day statute in arbitral cases not only raises the spectre of chaos, but is contrary to the Supreme Court's decision in Vaca v. Sipes, supra, holding that a breach of

duty of fair representation occurs either when a grievance is perfunctorily processed or a meritorious grievance is illegally or improperly ignored. Adoption of this arbitral distinction leads inexorably to unjustly punishing the employee who pursued his grievance through the arbitral process, while at the same time rewarding the employee whose grievance was not arbitrated by the mechanical applications of rules in defiance of the very policy that the Mitchell court devised to govern the resolution of labor disputes within the arbitral process. More importantly, an individual court-bound breach of duty suit, whether arbitrated or not, is also an unfair labor practice, to which the employee has recourse through the NLRB, and for that reason both remedies should be treated alike for limitations purposes by applying the NLRA six month statute.

Moreover, the imposition of the six month

period would bring to this area of law within the Fourth Circuit the desired uniformity amongst the states and between the litigants.

It is respectfully suggested, as Justice Stewart opined in United Parcel Service v. Mitchell, 101 S.Ct. 1568, that:

> "In a 10 (b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interest in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what what he views as an unjust settlement under the collective bargaining system. This is precisely the balance at issue in this case. The employee's interest in setting aside the final and binding determination of a grievance through the method established by collective bargaining agreements unquestionably implicates those essential processes that federal labor law is chiefly designed to promote -- the formation of the agreement and the private settlement of disputes under it. Accordingly, the need for uniformity among procedures filed for similar claims, as well as the clear congressional indication of proper balance between the interest at stake, counsel the adoption of 10(b) of the NLRA as the

as the appropriate limitations period for law suits such as this."

III

THE SIX MONTH LIMITATIONS PERIOD CONTAINED IN THE LABOR MANAGEMENT RELATIONS ACT OF 1947, AS AMENDED, 29 U.S.C.§610(b) CANNOT PROPERLY BE APPLIED TO THIS ACTION

The plaintiff has sought to avoid the consequences of his inaction by urging this court to apply the six month limitation set forth in Section 10(b) of the Labor Management Relations Act of 1947, as amended, (LMRA) 29 U.S.C. §160(b). In so doing, he points out that the Supreme Court, in Mitchell, did not decide the question of whether or not the §10(b) limitations period is applicable to an action filed under §301. Despite this admission, the plaintiff also relies on Mitchell as authority supporting the application of that six month statute of limitations. This anomalous position is unsupportable. As the plaintiff's citations to the minority opinions in Mitchell indicate, this alternative was rejected by the majority of the Court.

> Given the choices present here, and the undesirability of the results of the grievance and arbitral process being suspended in limbo for long periods, we think the District Court was correct when it chose the 90-day period imposed by New York for the bringing of an action to vacate an arbitration award.

451 U.S. at 64.

The holding in Mitchell is clear; in accordance with the principles laid down in Hoosier Cardinal Corp., supra, and myriad other §301 actions, a state statute of limitations is to be applied to actions such as the present one.[15] Moreover, in the forty-two states,

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[15] Section 10(b) states that the six month limitation period contained therein only applies to the filing of a charge with the National Labor Relations Board, not to the filing of any implied statutory cause of action. "Congress could not have intended for the §10(b) statute of limitations to apply to suits as the present one." Suwanchai v. I.B.E.W., Local 1973, supra. See also, Local 1020 v. FMC Corp., 658 F.2d 1285, 1289, n. 6 (9th Cir. 1981); Davidson v. Roadway Express, Inc., 650 F.2d 902, 904, n. 2 (7th Cir. 1981).

including Maryland, which enjoy the presence of a law governing the vacation of arbitral awards with an accompanying statute of limitations, Mitchell provides that this limitation is to be applied to the analogous action under Section 301, where the federal litigation has been preceded by arbitration or its equivalent. Thus, the Supreme Court properly left it to either the state legislatures to adopt a statute of limitations for actions to vacate arbitration awards where one is absent or the United States Congress to adopt a uniform applicable statute of limitations, if uniformity is deemed necessary.

Consistent with this precedent, it would be inappropriate for this appellate court to order the adoption of a uniform limitations period of six months to actions filed pursuant to §301. Such bold conduct would constitute judicial legislation and usurpation of a

function best left to those states which compose this Circuit, or to Congress. The non-uniformity of state limitations periods was forseen by the Mitchell court, 451 U.S. at 63, n. 5, 64. This lack of uniformity has been held to be inoffensive to the national labor policy.

> (A)ctions brought to enforce an arbitral award are separate from the arbitration process itself and only come into play after the arbitration has terminated. Thus, whatever need may exist for national uniformity regarding the use of the arbitration process for the private settlement of labor disputes, the same considerations do not require similar uniformity when the judiciary is called upon to enforce an arbitral award.

Service Employees International Union, Local No. 36 v. Office Center Services, Inc., supra, 109 LRRM at 2556.

Fair representation actions are not the only federal actions for which non-uniform state limitations are utilized. See e.g.,

Johnson v. Railway Express Agency, supra, 421 U.S. at 462 (Civil Rights Act of 1866); Cope v. Anderson, supra, 331 U.S. at 463 (National Bank Act); O'Sullivan v. Felix, 233 U.S. 318, 322 (1914) (Civil Rights Act of 1871); Chattanooga Foundry v. Atlanta, 203 U.S. 390, 397 (1906) (Sherman Act); Campbell v. City of Haverhill, 155 U.S. 610 (1895) (Patent Act). In remaining silent on the limitations period of §301, it cannot be inferred that Congress "did so in the expectation that the courts would invent one." Auto Workers v. Hoosier Cardinal Corp., supra, 383 U.S. at 703. The plaintiff, by requesting the application of §10(b)'s limitation period to this case, seeks the same relief that was denied in Hoosier Cardinal Corp. No developments in the ensuing years support reversal of that ruling.

The decision of the Supreme Court to apply a state statute of limitations to §301

actions, followed by the district court below, rationally furthers the public policy of encouraging the rapid resolution of labor disputes. At the same time, it in no way affects an aggreved party's right to seek relief from what it views as an unfair labor practice before the National Labor Relations Board. Well before this action arose, it was settled law that an action pursuant to 29 U.S.C. §185 and an unfair labor practice charge before the NLRB were separate and distinct. See, e.g., Hines v. Anchor Motor Freight, Inc., supra. Although the facts to be developed before each forum might be identical, the commencement of an action under one of the two provisions neither precluded nor compelled the simultaneous prosecution of an action under the other. The fact that inconsistent results might ensue also did not affect the application of this

judicial rule.[16] Accordingly, the district court's decision to apply Maryland's thirty day limitations period to bar the prosecution of this action should be affirmed.

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16 The cases suggested by the plaintiff in support of his position that the six month statute of limitations be applied to this case are inapposite:

McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958), involved actions under the Jones Act for negligence and under state law for unseaworthiness. The court found that both actions would have to be tried together and were thus so completely intertwined that, in order to further the purposes of the federal act, its statute of limitations would also be applied to the state action.

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), does not involve the application of statutes of limitation. In this case the court merely limited the plaintiff's right to recover damages under general maritime law to those available under the Death on the High Seas Act.

In Newport News Shipbuilding & Dry Dock Co. v. N.L.R.B., 631 F.2d 263 (4th Cir. 1980), the court specifically stated that a plaintiff need not file his unfair labor practice charge in the same action as his 301 claims.

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No. 81-2386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP DELCOSTELLO,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL.,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals properly concluded that Maryland's limitations period for actions seeking to vacate arbitration awards should apply to both employers and labor representatives in a post-arbitration fair representation action?

2. Whether the Court of Appeals erred in refusing to apply the limitations period for filing unfair labor practice charges under the National Labor Relations Act, when Petitioner declined to raise that contention before the District Court and such application by the Court of Appeals would not have altered its result?

3. Whether the Court of Appeals erred in refusing to limit the effect of United Parcel Service v. Mitchell, 451 U.S. 56 (1981) to prospective matters?

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OPINIONS BELOW

The initial opinion of the district court (Pet. B3-B15) is reported in 510 F.Supp. 716. The subsequent opinion of the

district court (Pet. B16-B29) which is the subject of the instant Petition is reported in 524 F.Supp. 721. The opinion of the court of appeals (Pet. B1-B2) is unpublished, but reported in 679 F.2d 879.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1982. The Petition was filed on June 29, 1982 and invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

COUNTERSTATEMENT OF THE CASE

Petitioner Philip Delcostello was terminated by Anchor Motor Freight, Inc. (Anchor) in June, 1977 after refusing an order. The termination was grieved in accordance with the collective bargaining agreement between Anchor and Local 557, International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America (Local 557). Unable to arrive at an amicable resolution of the issue, Local 557 submitted the matter for resolution by the Eastern Conference Automobile Transporters Joint Committee (Joint Committee). A final and binding arbitration award upholding Petitioner's termination was issued by the Joint Committee on July 19, 1977.

One month later a Business Agent of Local 557 sent Petitioner a copy of the minutes of the arbitration hearing, and advised Petitioner that they were to be submitted for approval at a scheduled meeting of the Joint Committee, in a manner similar to that by which corporate business minutes are submitted for approval. Petitioner responded by a letter dated September 14, 1977 asserting dissatisfaction with the grievance process, but making no request for a rehearing of his case.

Although possessing all information necessary to initiate his lawsuit by August 20, 1977, 524 F.Supp. at 722, Petitioner waited until March 16, 1978 to file an action. His Complaint, which in effect seeks to vacate the July, 1977 Joint Committee award, was filed more than seven (7) months after the award became final.

Respondents Local 557 and Anchor moved for summary judgment on grounds of limitations, inter alia. This theory was premised on Maryland's thirty day period for vacation of arbitration awards. Md. R.P.E4; Md. Cts. & Jud. Proc. Code Ann. §3-224. The district court rejected these positions, 510 F.Supp. at 720, but noted that the same limitations issue was pending before the Supreme Court.

When the Court resolved the limitations issue in United Parcel Service, Inc.

v. Mitchell, 451 U.S. 56 (1981), both Respondents urged the district court to reconsider its earlier ruling in light of Mitchell. Petitioner's response challenged the retroactive application of Mitchell, application of Mitchell to Local 557 and the reasonableness and constitutionality of a thirty day limitations period. Petitioner declined to raise any contention concerning adoption of the limitations period utilized for unfair labor practice charges under the National Labor Relations Act and that issue was not considered by the district court. The district court held that Mitchell could be retroactively construed to apply to the case at bar and that Maryland's thirty day period for vacation of an arbitration award was the controlling limitations period governing claims against both Respondents.

Petitioner subsequently appealed the judgment to the Court of Appeals for the

Fourth Circuit. On appeal, Petitioner reiterated many of his arguments made below and added the contention that 29 U.S.C. §160(b) [Labor Management Relations Act of 1947, as amended, §10(b)] should govern limitations in fair representation actions arising under 29 U.S.C. §185 [Labor Management Relations Act of 1947, as amended, §301]. The Fourth Circuit gave no consideration to that issue in affirming the lower court's judgment.

SUMMARY OF ARGUMENT

Certiorari should be denied. The ruling of the Fourth Circuit Court of Appeals is in harmony with this Court's Mitchell doctrine. Application of a state's limitations period for vacation of arbitration awards to a labor organization was contemplated and intended by the Court. The issue of application of the limitations

period governing actions under the National Labor Relations Act is not properly presented before the Court. Finally, there is no conflict of authority between the circuit courts of appeal on the issue of retroactive application of Mitchell.

ARGUMENT

I. MITCHELL IS APPLICABLE TO UNIONS DEFENDING POST-ARBITRATION FAIR REPRESENTATION ACTIONS

Petitioner ignores the plain language of the Court's opinion by contending that Mitchell offers a limitation defense to employers, but not labor organizations. Unfortunately, this misinterpretation is shared in the holding of one circuit court of appeals, Flowers v. Local 2602 of United Steelworkers, 671 F.2d 87, 90 (2d Cir. 1982), petition for cert. filed sub nom. United Steelworkers of America v. Flowers, 51 U.S.L.W. 3006 (U.S. Jul. 1, 1982)

(No. 81-2408), and the dicta of another. Edwards v. Sea-Land Service, Inc., 678 F.2d 1276, 1284 (5th Cir. 1982).[1] If the Court determines that this conflict warrants resolution, its efforts should be limited to reversing the Second Circuit's decision in Flowers.

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1. Petitioner incorrectly argues that Sear v. Cadillac Auto Co. of Boston, 654 F.2d 4 (1st Cir. 1981) and Davidson v. Roadway Exp., Inc., 650 F.2d 902 (7th Cir. 1981) join in this misconstruction of Mitchell. The Sear court considered the question, but determined that it would not decide the limitations issue since it could base its ruling on other considerations. 654 F.2d at 7. The Davidson court merely questioned the applicability to unions of 29 U.S.C. §160(b), 650 F.2d 904, n. 2, an issue which did not confront that court.

Several circuit courts have interpreted Mitchell as applying to unions. Badon v. General Motors Corp., 110 LRRM 2562, 2565 (6th Cir. May 25, 1982); Singer v. Flying Tiger Line Inc., 652 F.2d 1349, 1353 (9th Cir. 1981). Cf. Service Emp. Intern. Union, Etc. v. Office Ctr., Etc., 670 F.2d 404, 408, n. 7 (3rd. Cir. 1981).

In Mitchell the Court was confronted with the task of selecting the most appropriate state limitations period to be applied to an employee's post-arbitration §301 action, as required by Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704-705 (1966). The employee had initiated the case against both his employer and union, but only the employer was before the Court.[2] In concluding that New York's statute of limitations for vacation of ar-

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2. Pursuant to Rule 19.6 of the Revised Rules of the Supreme Court of the United States, the union filed a brief in support of the Petitioner employer. 451 U.S. at 57. Additionally, the only amici curiae briefs were filed on behalf of the American Federation of Labor and Congress of Industrial Organizations and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. 451 U.S. at 57-58.

bitration awards was applicable to §301 fair representation actions, the Court used an analysis which was dependent upon its applicability to unions.

The Mitchell respondent had argued that New York's six year limitations period for breach of contract should apply. The Court rejected this thrust, pointing out that an employee's mere proof of violation of the collective bargaining agreement was not enough to afford relief in a §301 action. Rather, in order to prevail against either the employer or union, the employee had to demonstrate breach of duty of fair representation by the union. That additional element made such a suit more closely analogous to an action to vacate an arbitration award than to a normal breach of contract case. 451 U.S. at 62.

The required proof of unfair representation rendered such litigation a con-

struct of "labor law" rather than an offspring of traditional contract law. Accordingly, the primacy of the federal labor policy of "rapid disposition of labor disputes", Hoosier Cardinal, supra, 83 U.S. at 707, directed the Court to select the shorter limitations period. 451 U.S. at 63.

In the instant matter, Petitioner is charged with the requirement of demonstrating that Local 557 breached its duty of fair representation toward him. Petitioner may not obtain any remedy against either his former employer or union absent proof of the union's wrongful conduct. The instant litigation is therefore a creature of labor law, for which rapid disposition is essential.

This national labor policy applies with equal force to all participants within the

the labor relations process. The contrary result, as urged by Petitioner, would leave unsettled questions concerning appropriate methods for grievance handling by unions for prolonged periods.[3] Unions would be left in extended limbo, unable to verify that their conduct would not be subject to legal challenge.

Employees reap few discernable benefits from maintaining unions as parties in

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3. Absent application of the state statute of limitations for vacation of arbitration awards to unions, federal courts would again choose between either state tort or contract limitations periods. Note Statutes of Limitations Governing Fair Representation Action Against Union When Brought with Section 301 Action Against Employer, 44 Geo. Wash. L. Rev. 418 (1976); R. Gorman, Basic Text on Labor Law at 724-25 (1976). These state statutes are normally of much greater duration than those governing actions to vacate an arbitration award. 451 U.S. at 63, n. 5.

representation cases where employers have been dismissed (as in Flowers). Since an employee's damages are normally created by the employer's breach of contract, the employer and not the union is liable for those losses. Vaca v. Sipes, 386 U.S. 171, 195-198 (1967); Bowen v. United States Parcel Service, 642 F.2d 79 (4th Cir. 1981), cert. granted, 50 U.S.L.W. 3465 (U.S. Dec. 8, 1981) (No. 81-525). The system of industrial justice would not be advanced by a limitations system which distinguished between parties to a collective bargaining agreement, yet afforded no remedy against the party left to defend the other's actions.

The Fourth Circuit and district court properly followed the Court's reasoning in Mitchell. That reasoning compels application of Mitchell's limitation doctrine since "the nature of the cause of

action, not the identity of the defendant . . . controls the choice of limitation statutes". Walsh v. Boss Linco Lines, Inc., 537 F.Supp. 363, 364 (D. N.J. 1981). Utilizing state statutes of limitations for vacation of arbitration awards establishes uniformity within a particular proceeding, furthers the national labor policy favoring rapid resolution of work-place disputes and does not deprive employees of substantive rights. If the Court is desirous of emphasizing these policies, it should correct the error of the Flowers court, while leaving the Fourth Circuit's decision undisturbed.

II. THIS CASE DOES NOT OFFER THE COURT AN APPROPRIATE OPPORTUNIT TO CONSIDER THE APPLICABILITY OF 29 U.S.C. §160(b)

In an amicus curiae brief filed in Mitchell, the American Federation of Labor and Congress of Industrial Organizations

urged the Court to adopt the six month limitations period of §10(b) of the National Labor Relations Act in §301 fair representation cases. The Court refused to adopt this theory, noting both that it had not been raised in the case and that the action was commenced outside both the statutory six month limitations period and New York's ninety day period. 451 U.S. at 60, n. 2. Those same shortcomings are present in the instant case, so that a grant of certiorari would not allow the Court to appropriately consider this issue.

In replying to the Joint Motion for Reconsideration filed in the district court by Local 557 and Anchor, Petitioner argued, inter alia, that Maryland's thirty day limitations period was unconstitutional

because it was unreasonably short.[4] Petitioner recognized that Mitchell had approved New York's ninety day limitations period, but contended that Maryland's thirty day period offered an insufficient time in which to prepare a lawsuit challenging a detrimental arbitration ruling. Petitioner asserted that although "it would be presumptuous to expect this Court to promulgate a new national policy establishing six month limitations for all 301 actions, it is quite appropriate for the

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4. Although it was pressed before the district court, Petitioner has abandoned this constitutional question. By contrast, Petitioner was silent before the district court but now argues that the Maryland Arbitration Act is expressly inapplicable to labor disputes. The thirty day limitations period is found in Md. Cts. & Jud. Proc. Code Ann. §3-224. The exclusion from the Maryland Arbitration Act of labor matters is remedied by Maryland Rule of Procedure E4. That Rule applies the procedural framework of the Act to arbitration matters for which the Act is inapplicable.

Plaintiff to assert that the thirty day limitation period is unreasonably short". (Brief of Plaintiff in Support of its Answer to Motion for Summary Judgment, filed May 27, 1981, at 29.) Since it was not confronted with the §10(b) issue, the district court gave it no mention in either of its opinions. In affirming, the circuit court made no mention of §10(b). Where opinions of the district court and circuit court are devoid of any reference to a particular issue, as here, the Court has held that it would not consider it in the first instance. Ramsey v. Mine Workers, 401 U.S. 302, 312 (1971).

Even if Petitioner had preserved his §10(b) contention, it would be unavailing. Petitioner initiated this litigation on March 16, 1978, seven months after he was aware his termination had been upheld in arbitration. Petitioner seeks to avoid the

consequences of his delay by arguing that limitations were tolled until December, 1977.

In support of this position, Petitioner distorts the opinion of the district court. The district court did not decide the issue of tolling of limitations, since the action was not filed until Maryland's thirty day period had run. Thus, even assuming Petitioner's tolling argument was meritorious, the action was untimely filed. 524 F.Supp. at 723. Since Petitioner failed to argue the applicability of §10(b), the district court was not required to decide whether or not limitations were tolled.

Applicability of §10(b) to §301 fair representation cases is an interesting issue which this Court may eventually decide. However, the instant Petition suf-

fers from dual defects which render it a poor choice for disposition of that question.

III. MITCHELL SHOULD NOT BE LIMITED TO PROSPECTIVE APPLICATION

Petitioner argues that a conflict exists between the circuit courts of appeal concerning the retroactive application of Mitchell. Since certiorari is denied absent "principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal", Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923), careful scrutiny of that alleged conflict is warranted.

Singer v. Flying Tiger Line Inc., 652 F.2d 1349 (9th Cir. 1981), involved the claim of an airline flight engineer that he

should have been given the opportunity to become a co-pilot. More than one year after an unsuccessful third arbitration proceeding, he filed suit against both his employer and union. Although California has a one hundred day limitations statute for vacation of arbitration awards, Cal. Civ. Proc. Code §1288, neither defendant advocated its applicability before the district court. Accordingly, the Singer court held that adoption of the short limitations period would be inappropriate. 652 F.2d at 1353. The court only considered the issue of retroactive application of Mitchell as an afterthought, and absent briefs on this issue.[5] The Singer court went on to grant

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5. Mitchell was decided after all briefs had been filed in Singer. 652 F.2d at 1353. It is not apparent from the Singer opinion whether any party orally advocated the applicability of Mitchell.

summary judgment to the defendants on other issues. 652 F.2nd at 1356.

The Singer court's consideration of retroactive application of Mitchell was not decisive of its ultimate conclusion. Its discussion of the issue is mere dicta, and lacks the analysis offered in the instant case. See 524 F.Supp. at 722-724.

A conflict between the circuit courts of appeal warranting a grant of certiorari should be premised upon irreconcilable holdings. Such a conflict is not presented by distinguishable dicta, such as is offered in Singer. 524 F.Supp. at 724.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

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No. 81-2386

In the Supreme Court of the United States

October Term, 1981

PHILIP DEL COSTELLO,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT ANCHOR MOTOR FREIGHT, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the lower courts correctly apply Maryland's limitations period for the vacation of arbitration awards to the petitioner's §301 claims against a union?

2. Did the lower courts properly decline to apply the statute of limitations found at 29 U.S.C. §160(b) to an action brought pursuant to the Labor Management Relations Act, in lieu of Maryland's applicable limitations period for the vacation of arbitration awards?

3. Did the lower courts correctly allow retrospective application of *United Parcel Service, Inc. v. Mitchell* to the facts of this case?

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No. 81-2386

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PHILIP DEL COSTELLO,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT ANCHOR MOTOR FREIGHT, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Anchor Motor Freight, Inc. through counsel respectfully prays that the Petition for Writ of Certiorari be denied.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland at 524 F. Supp. 721 (D. Md. 1981) is the decision from which this petition arose. This opinion substantially revised the earlier decision of the district court at 510 F. Supp. 716 (D. Md. 1981). The opinion of the Court of Appeals for the Fourth Circuit, affirming 524 F. Supp. 721 (D. Md. 1981), is unpublished but reported at 679 F.2d 879 (4th Cir. April 19, 1982).

STATUTES INVOLVED

National Labor Relations Act §10(b), 29 U.S.C. §160(b)

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules

of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Labor-Management Relations Act §301(a), 29 U.S.C. §185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Md. Cts. & Jud. Proc. Code Ann. §3-224

(a) *Petition.*—(1) Except as provided in paragraph (2), a petition to vacate the award shall be filed within 30 days after delivery of a copy of the award to the petitioner.

(2) If a petition alleges corruption, fraud, or other undue means it shall be filed within 30 days after the grounds become known or should have been known to the petitioner.

(b) *Grounds.*—The court shall vacate an award if:

(1) An award was procured by corruption, fraud, or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral, corruption in any arbitrator, or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement,

refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of §3-213, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement as described in §3-206, the issue was not adversely determined in proceedings under §3-208, and the party did not participate in the arbitration hearing without raising the objection.

(c) *When award not to be vacated.*—The court shall not vacate the award or refuse to confirm the award on the ground that a court of law or equity could not or would not grant the same relief. (Ann. Code 1957, art. 7, §12; 1973, 1st Sp. Sess., ch. 2, §1.)

Md. R. P. E2

After a final award has been made in writing in an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, court proceedings may be had to confirm, vacate, modify, correct, or enter judgment on the award. In any such case, the provisions of the Maryland Uniform Arbitration Act concerning such proceedings shall be applicable.

Md. R. P. E4

The procedure for application to a court otherwise than as provided in Rule E2 of this Subtitle for any relief in connection with an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, shall be as nearly as practicable the same as that provided for such an application in arbitration to which said act applies. This Rule affects only the procedure in such proceedings and does not establish a right to have any question determined by court.

COUNTERSTATEMENT OF THE CASE

The petitioner brought an action pursuant to §301 of the Labor Management Relations Act, 29 U.S.C. §185, in the United States District Court for the District of Maryland, seeking essentially the same relief that had been denied to him in a grievance arbitration proceeding. This action was filed more than seven months after the adverse arbitration award was issued, at a time when judicial determinations within Maryland and the Fourth Circuit provided no authoritative guidance on the amount of time a party could defer filing a timely action. For over a decade other federal courts in numerous jurisdictions had been applying state statutes of limitations for actions to vacate arbitration awards to cases such as the petitioner's. However, the petitioner chose to ignore Maryland's limitations period for arbitration vacation actions and delayed the commencement of litigation. On the basis of these facts, after reviewing the Supreme Court's decision in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), the district court granted summary judgment in favor of the respondents, holding that the petitioner's action was time-barred. The lower court concluded that Maryland's statute of limitations for actions to vacate arbitration awards was applicable to §301 claims against employers and unions, in accordance with the view expressed by the majority of the justices in *Mitchell*, and that it was appropriate to apply this state limitations period to a case filed prior to Mitchell's issuance. The court of appeals summarily affirmed the decision of the lower court, based on the reasoning found in that court's opinion. The holding of the Court of Appeals for the Fourth Circuit is in harmony with those of other circuit courts, as well as the opinion of the Supreme Court in *Mitchell*. The granting of a writ of certiorari in this case will therefore

resolve no substantial conflict. Under these circumstances it is appropriate for this Court to decline to allow a writ of certiorari to be issued.

Factual Background

Respondent Anchor Motor Freight, Inc. (Anchor) is a corporation engaged in the business of transporting new automobiles throughout this country and in Canada. Petitioner Philip Del Costello was for a time employed by Anchor at its Baltimore, Maryland facility as a driver, hauling cars. Respondent Freight Drivers and Helpers, Local 557 (Local 557) is a labor organization affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. At all times relevant to this action, Del Costello was a member of Local 557, which served as his exclusive bargaining agent at Anchor.

The terms and conditions of Del Costello's employment with Anchor were detailed in the National Master Automobile Transporters Agreement and supplemental agreements (the Agreement). This document also established readily available procedures for the resolution of labor disputes.

On June 27, 1977 Del Costello was assigned to drive a tractor-trailer loaded with new cars from the Baltimore terminal to Canada. Even after some requested repairs were made and his superiors assured him that the equipment was safe, Del Costello refused to drive the rig claiming that it was still unsafe. Anchor dispatched the vehicle without further repairs to another driver who examined the equipment, found no hazards and safely made the designated trip.

Del Costello's refusal to work was construed by Anchor as a voluntary quit. When informal attempts by Local 557 to gain Del Costello's reinstatement proved fruitless, formal grievance proceedings were initiated by the union.

In mid-July, 1977, a hearing was held on Del Costello's grievance before the Eastern Joint Conference Automobile Transporters Joint Committee (Joint Committee). Article 7, Section 6 of the Agreement provides in pertinent part that "[a] decision by a majority of a Panel of any of the Committees shall be final and binding on all parties, including the employee and/or employees affected." The Joint Committee denied Del Costello's grievance and held that the plaintiff's refusal to follow his superior's instructions constituted a voluntary quit. Del Costello received a copy of the adverse award "several days" after it was rendered. *Delcostello v. International Broth. of Teamsters, etc.*, 524 F. Supp. 721, 722 (D. Md. 1981).

On or about August 19, 1977, Local 557's Business Agent sent Del Costello a copy of the minutes of his grievance. The Business Agent informed him in an accompanying letter that these minutes were to be submitted for approval at a scheduled meeting of a Joint Committee. By sending him the minutes, the Business Agent gave Del Costello an opportunity to make any corrections that he deemed necessary before the Joint Committee acted in mid-September. The process to be followed then was much the same as when a deposition is presented to the deponent for review. Del Costello, like a deponent, was to correct clerical or other similar errors in the document in order to assure its accuracy; he was not to change or add new material to his prior testimony. Nowhere in the Business Agent's letter was it stated that either Del Costello's response or the September Joint Committee meeting might

be used as a forum for the rehashing of Del Costello's grievance or for the airing of his dissatisfaction with the handling and result of his grievance. Nowhere was it suggested that the decision underlying those minutes was less than final and binding.

Del Costello did not contest either the accuracy of the minutes or the finality of the Joint Committee decision in his response. Instead, he set out the reasons for his dissatisfaction with the contractual grievance process. This was not a formal request for a rehearing of his grievance; nowhere in the letter was a rehearing requested. To the contrary, Del Costello asserted in his letter that even if the Joint Committee had heard all of the relevant evidence, it would have been incompetent to understand it.

Proceedings Below

The petitioner had knowledge of all the facts on which he was to base his lawsuit by August 20, 1977, at the latest. *Id.* at 722. Nevertheless, he waited until March 16, 1978 to file an action in the Federal District Court for Maryland, alleging that his employment had been wrongfully terminated by Anchor and that Local 557[1] had breached its duty to represent him fairly in the ensuing grievance proceedings.[2] This action, which in effect seeks to vacate the July, 1977 Joint Committee award in order to obtain the

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1. The International Brotherhood of Teamsters (International) was also named as a defendant in the petitioner's complaint. The allegations concerning the International are not material to the petition.

2. Nothing in the record below indicates that in the interim Del Costello filed a complaint of any nature with the National Labor Relations Board concerning his employer or the termination of his employment. Consequently, the petitioner's statements concerning the course of such newly-alleged proceedings are not properly before this Court.

relief demanded in the complaint, was filed over seven months after the final and binding grievance award was issued.[3]

Anchor has consistently maintained that the petitioner's claims are time barred.[4] In response to Del Costello's original complaint, allegedly grounded on 29 U.S.C. §§185, 301 and 411, Anchor specifically asserted that the prosecution of the plaintiff's litigation was barred by the application of the appropriate statute of limitations. After discovery was completed, the respondents filed separate motions for summary judgment.[5] In each motion, it was asserted that Del Costello's claims were barred by the statute of limitations. Specifically, Anchor and Local 557 maintained that the application of a thirty-day statute of limitations derived from Maryland's limitations period for the filing of actions to vacate arbitration awards, Md. Cts. & Jud. Proc. Code Ann. §3-224, applied in conjunction with Maryland Rule of Procedure E4, precluded the district court from considering the merits of the plaintiff's claims.

At first, in reliance on the recent decision of the Court of Appeals for the Second Circuit in *Mitchell v. United*

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3. Contrary to the petitioner's assertions, the district court did not "conclude" that Anchor and Local 557 were estopped from claiming that the statute of limitations began to run before December, 1977. The court stated that "[e]ven assuming that limitations did not begin to run until . . . late December, 1977" the action was not timely filed. The court declined to decide the issue of estoppel because it deemed the resolution of that issue unnecessary.

4. The issue of waiver of the statute of limitations defense was neither raised by the petitioner nor considered by the court at any point in the district court proceedings.

5. The International, which is not a party to this petition, submitted a separate motion for summary judgment urging the dismissal of all claims against it on different grounds. This motion was granted.

Parcel Service, Inc., 624 F.2d 394 (2d Cir. 1980), the Maryland district court declined to grant the respondents' motions for summary judgment.[6] However, following the reversal of the Second Circuit decision by this Court and upon review of the respondents' joint motion for reconsideration the district court recognized the propriety of applying the principles explained by the Supreme Court in *Mitchell* to the case at hand and granted judgment in favor of the respondents.[7] Petitioner filed a timely notice of appeal from this second Order to the Court of Appeals for the Fourth Circuit.[8] The court considered the briefs and oral arguments of petitioner and respondents. In an unpublished per curiam opinion, the appellate court affirmed the decision of the district court.[9] Petitioner now seeks this Court's review of his claims. However, the issuance of a writ of certiorari is not warranted.

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY

Supreme Court review of this case is unwarranted. The petitioner has established no special or important reasons justifying the granting of a writ of certiorari. Instead of demonstrating that a conflict exists between the de-

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6. *Delcostello v. Intern. Broth. of Teamsters*, 510 F. Supp. 716 (D. Md. 1981).

7. *Delcostello v. International Broth. of Teamsters, etc.*, 524 F. Supp. 721 (D. Md. 1981).

8. No appeal was taken concerning the granting of summary judgment in favor of the International. In addition, the petitioner's appeal did not question the dismissal of his claims filed pursuant to 29 U.S.C. §§301 and 411.

9. 679 F.2d 879 (4th Cir. 4/19/82).

cisions of courts of appeals on issues decided by the Fourth Circuit in this case, the petitioner has shown no more than a lack of harmony among inapposite district courts' determinations. Instead of presenting this court with substantial authority to support his views, the petitioner has merely indicated his reliance on limited dissents and some scattered opinions of district courts. The Court cannot allow a writ of certiorari to issue in this context, where, in addition, not all of the petitioner's reasons for granting the writ were urged at the district court level.

ARGUMENT

I. Maryland's Limitations Period for Actions to Vacate Arbitration Awards Was Correctly Applied to Bar the Petitioner's §301 Action Against Local 557

There is no significant conflict between the circuit courts concerning the application of *Mitchell* to §301 actions against unions.[10] With but one exception,[11] the decisions of the appellate courts that have had an opportunity to consider the issue on a full record have been in accord with the opinion of the Fourth Circuit applying the state limitations period for actions to vacate arbitration

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10. The resolution of this particular issue in no way affects the applicability of Maryland's thirty-day limitations period for the vacation of arbitration awards to the petitioner's claims against respondent Anchor. Nonetheless, Anchor addresses this issue in order to underscore the respondents' position that certiorari is neither necessary nor warranted in this instance.

11. *Flowers v. Local 2602, United Steel Workers*, 671 F.2d 87 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3006 (U.S. July 13, 1982) (No. 81-2408) discussed *infra*.

awards.[12] In this context, Supreme Court review of the Fourth Circuit's decision is unnecessary and unwarranted.

A careful reading of *Mitchell* reveals that its holding was designed to apply to the union as well as the employer. The only defendant before the *Mitchell* Court was the employer. 451 U.S. at 71. However, it was apparent to Justice Stevens that the Court's ruling would be equally applicable to both employer and union. Accordingly, he filed a separate opinion, dissenting from application of the defense to unions. 451 U.S. at 72. To deny the efficacy of the limitations defense to unions would give full effect to Justice Stevens' dissent, rather than to the majority's opinion. *Mitchell v. United Parcel Service, Inc.*, Case 78-C-1547 (E.D. N.Y. October 13, 1981). Therefore, it was proper for the court of appeals to affirm the lower court's decision to apply Maryland's thirty-day limitations period to bar the petitioner's action against Local 557.

In *Badon v. General Motors Corp.*, 110 L.R.R.M. 2562, 5 Lab. L. Rep. (CCH) (94 Lab. Cas.) ¶13,572 (6th Cir. 1982), the Court of Appeals recognized that the state's limitations period for arbitration vacation actions would have to be applied to §301 claims against a union, if it was possible to do so under Michigan's law. However, Michigan had specifically excluded labor arbitration from coverage by its twenty-day limitations period and did not counterbalance this exclusion with a savings provision similar to Maryland's Rule E4, Md. R. P. which would allow the use of the local limitations period in the federal proceedings. The Court of Appeals, which did not deem itself com-

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12. Although district courts in various jurisdictions may have reached apparently inconsistent results, the resolution of such conflicts is best left for the courts of appeals in the first instance. It is, therefore, not appropriate for this Court to grant a writ of certiorari on the basis of the existence of non-uniform results at the district court level.

petent to override the will of the state and apply the limitations provision despite that exclusion, could find no other state limitations period that effectuated Congress' desire for the rapid resolution of labor disputes. Consequently, it applied the six month limitations period found at §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). A similar set of facts compelled the Court of Appeals for the Fifth Circuit to select Texas' two year statute of limitations for tort claims in a §301 action against a union. In *Edward v. Sea-Land Service, Inc.*, 678 F.2d 1276 (5th Cir. 1982), as in *Badon*, the court indicated that its first choice would be to apply the local limitations period for arbitration vacation actions if that option was not expressly eliminated by the state.

One relevant point emerges from these cases, notwithstanding any possible error in the decision of these two circuit courts to abide by the states' exclusion of labor matters from coverage of the local limitations provisions: The Fifth and Sixth Circuits have made it plain that, under facts similar to those present in Del Costello's case, they would join the Third[13] and Fourth[14] Circuits in applying the state limitations period for actions to vacate arbitrations to §301 claims asserted against a union.

Only one other appellate court has had the opportunity to address this issue directly on a full record. However, a number of other courts of appeals have discussed the question of what limitations period they would apply to §301 actions against unions. The First Circuit suggests that

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13. *Service Employees International Union, Local No. 36, AFL-CIO v. Office Center Services, Inc.*, 670 F.2d 404 (3rd Cir. 1982).

14. *Delcostello v. International Broth. of Teamsters, etc.*, 679 F.2d 879 (4th Cir. 1982).

a statute of limitations for tort actions would be applied, in conformity with controlling past precedent in the circuit.[15] The Seventh Circuit might apply the NLRA's six-month limitations period.[16] The Ninth Circuit would apply arbitration vacation limitations periods to post-*Mitchell* cases, and tort action statutes of limitations to cases filed before *Mitchell*.[17]

The unsolicited comments of these three courts did not result from the review of records wherein the application of an arbitration vacation statute of limitations was at issue. The parties in these cases were given no opportunity to address the issue of whether this limitations period should apply to §301 suits against unions or to present all of the relevant facts in support of their positions on this subject. As a result, the varied intimations of the First, Seventh and Ninth Circuits have no precedential value and can create no conflict for this Court to resolve.

Only the Court of Appeals for the Second Circuit, when directly confronted with the issue, declined to apply an available state limitations period for arbitration vacations to §301 actions against unions. In *Flowers v. Local 2602, United Steel Workers, supra* n. 11, the appellate

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15. *Sear v. Cadillac Auto Co. of Boston*, 654 F.2d 4 (1st Cir. 1981) (Summary judgment for union affirmed. Adoption of limitations period for vacating arbitration awards not urged at trial level or at appellate arguments.)

16. *Davidson v. Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981), *cert. denied*, ... U.S. ....., 102 S.Ct. 1447, 71 L.Ed.2d 661 (1982) (Action only against employer, not union.)

17. *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349 (9th Cir. 1981) (Adoption of state statute of limitations for vacating arbitration awards never raised in district court.); *Christian v. Pioneer Sand & Gravel Co.*, No. 81-3003 Slip op. (9th Cir. June 25, 1982). (Summary judgment granted in favor of the union on the basis of a three year statute of limitations in a pre-*Mitchell* decision not appealed.)

court neither adopted the ninety-day period suggested by *Mitchell* and accepted by *Mitchell v. United Parcel Service, Inc.*, Civil Action No. 78-C-1547 (E.D. N.Y. October 13, 1981), nor the six year statute of limtations that had been historically utilized by the Second Circuit, *e.g., Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1978). Instead, the court applied the reasoning of Justice Stevens' dissent in *Mitchell* and imposed a three year limitations period for malpractice actions to the claims against the union.

Because *Flowers* follows the dissent of one Justice rather than the will of the majority of the Court or even precedent within the Second Circuit, it is an aberration entitled to no weight. For this reason it also cannot be considered as establishing a conflict among the courts of appeals. However, if the incongruous result in *Flowers* were to be considered in serious conflict with the decisions of the Third, Fourth, Fifth and Sixth Circuits, this Court should resolve that conflict directly by granting the petition for a writ of certiorari now pending before this Court in *Flowers*[18] and not the petition in this case.

The allowance of a writ of certiorari in *Flowers* would make the Court's review of this case superfluous. At the same time, denying the petition for a writ of certiorari in this case would allow the Court to avoid the problems inherent in a collateral attack of the *Flowers* decision. Sound reason and judicial economy therefore dictate that whether or not *Flowers* is found to create a conflict among the circuits in the choice of limitations period to be applied in §301 actions against unions, the petitioner's request for a writ of certiorari in this case should be denied.

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18. *See supra* note 11, at 11.

II. There Was No Error in the Refusal to Apply the Six Month Limitations Period From the National Labor Relations Act to This §301 Proceeding

It is not appropriate for this Court to determine whether the six month limitations period described at §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), is applicable to actions filed pursuant to §301 of the Labor Management Relations Act for the reason that this issue was not properly raised at the district court level and preserved for reconsideration. Although the petitioner casually alluded to the existence of §10(b) as an alternative statute of limitations provision in his briefs in response to the respondents' motions for summary judgment, at no time did he urge the district court to adopt that six month limitations period. To the contrary, while strenuously advocating the implementation of a tort or contract statute of limitations before the district court, the petitioner expressly relied on judicial precedent that proclaimed the inapplicability of §10(b)'s limitations provision to §301 actions and stated that "it would be presumptious to expect this Court to promulgate a new national policy establishing six month limitations for all 301 actions . . ."

The petitioner's failure to urge implementation of §10(b) before the district court defeats any argument he may have been able to raise at that level. *American Casualty Co. v. Morris*, 51 F. Supp. 889 (N.D. W.Va. 1943), *aff'd*, 146 F.2d 208 (4th Cir. 1944). The desirability of finalizing judgments and terminating litigation leads to the binding of a party to the theories presented to the district court. *In re Linda Coal and Supply Company*, 255 F.2d 653 (3rd Cir. 1958); *Booth v. State Farm Mut. Automobile*

Ins. Co., 138 F.2d 844 (4th Cir. 1943). If the petitioner felt compelled to raise this issue, the district court was the appropriate initial forum. Having failed to urge the application of §10(b) at that initial stage in this proceeding, he is not able to do so now. Accordingly, the petitioner's request for review of this question must be denied.

The Court should not issue a writ of certiorari based on the petitioner's assertion that the §10(b) limitations provision should have been applied even if the matter is properly before this Court. The question properly before the Court in this instance is very narrow: In a §301 action that has been preceded by arbitration involving the same parties and issues, is it correct to apply a viable state limitations period for the vacation of arbitration awards to the petitioner's claims? *Mitchell* compels an affirmative response and practically all of the courts of appeals have demonstrated that they would tender the same answer. Consequently, there is no issue for this Court to resolve.

The holding in *Mitchell* is clear; in accordance with the principles laid down in *International Union, United Auto Wkrs. v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), and myriad other §301 actions, a state statute of limitations is to be applied to actions such as the present one.[19] Moreover, in the states which enjoy the presence of a law governing the vacation of arbitral awards with an accompany-

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19. Section 10(b) states that the six month limitation period contained therein only applies to the filing of a charge with the National Labor Relations Board, not to the filing of any implied statutory cause of action. "Congress could not have intended for the §10(b) statute of limitations to apply to suits as the present one." *Suwanchai v. I.B.E.W., Local 1973*, 528 F. Supp. 851 (D. N.H. 1981). *See also, Local 1020 v. FMC Corp.*, 658 F.2d 1285, 1289, n. 6 (9th Cir. 1981); *Davidson v. Roadway Express, Inc.*, 650 F.2d 902, 904, n. 2 (7th Cir. 1981).

ing statute of limitations,[20] *Mitchell* provides that this limitation is to be applied to the analogous action under §301, where the federal litigation has been preceded by arbitration or its equivalent.[21] Thus, the Supreme Court has left it to either the state legislatures to adopt a statute of limitations for actions to vacate arbitration awards where one is absent or the United States Congress to adopt a uniform applicable statute of limitations, if uniformity is deemed necessary.

The establishment of a nationally uniform statute of limitations for §301 actions by the adoption of §10(b)

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20. Petitioner argues, although he was silent in the district court, that the Maryland Arbitration Act is expressly inapplicable to labor disputes (Brief of Appellant at 30). The thirty day limitations period is found in Md. Cts. & Jud. Proc. Code Ann. §3-224. The exclusion from the Maryland Arbitration Act of labor matters is remedied by Maryland Rule of Procedure E4. That Rule applies the procedural framework of the Act to arbitration matters for which the Act is inapplicable. Therefore, the decision of the Fourth Circuit is consistent with the decisions of the Fifth Circuit in *Edward v. Sea-Land Service, Inc., supra,* and the Sixth Circuit in *Badon v. General Motors Corp., supra.* Moreover, the statute of limitations found in §3-224 is applicable to this action in accordance with *Mitchell,* notwithstanding the fact that the plaintiff here might not be able to maintain a direct action under §3-224. The employee need not be able to vacate the arbitration under the state's provision. Its limitations period will still be applied to the similar federal §301 action. The Supreme Court in *Mitchell* specifically provided that "[t]he fact that an employee could not bring a direct suit to vacate an arbitration award, however, does not mean that his section 301 claims, which if successful would have the same effect is not 'closely analogous' to such an action." 451 U.S. at 61, n. 3.

21. Petitioner has attempted to create the appearance of a conflict between the circuits by citing numerous decisions in support of the proposition that a statute of limitations other than the one for vacating arbitration awards is to be applied to §301 actions that were not preceded by arbitration. These cases are inapposite due to the fact that the petitioner's litigation was in fact preceded by arbitration. Moreover, in the one appellate court decision cited by the petitioner, *Baker v. Amsted Industries, Inc.*, 656 F.2d 1245 (7th Cir. 1981), the choice of statute of limitations was not an issue.

would be unnecessary and unwarranted judicial legislation. The non-uniformity of limitations periods was foreseen in *Mitchell*, 451 U.S. at 63, n. 5, 64. This lack of uniformity has been held to be inoffensive to the national labor policy. *See Service Employees International Union, Local No. 36 v. Office Center Services, Inc., supra*, at 2556.

Fair representation actions are not the only federal actions for which non-uniform state limitations are utilized. *See e.g., Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975) (Civil Rights Act of 1866); *Cope v. Anderson*, 331 U.S. 461, 463 (1947) (National Bank Act); *O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914) (Civil Rights Act of 1871); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390, 397 (1906) (Sherman Act); *Campbell v. City of Haverhill*, 155 U.S. 610 (1895) (Patent Act). In remaining silent on the limitations period of §301, it cannot be inferred that Congress "did so in the expectation that the courts would invent one." *Auto Workers v. Hoosier Cardinal Corp., supra*, 383 U.S. at 703. The petitioner, by requesting the application of §10(b)'s limitations period to this case, seeks the same relief that was denied in *Hoosier Cardinal Corp.* No developments in the ensuing years support reversal of that ruling.

There is no conflict between the circuits concerning the refusal to apply the §10(b) limitations provision to §301 actions such as the petitioner's. The courts of appeals that have had occasion to consider the applicability of §10(b) on a full record have consistently declined to adopt it if there was any local limitations provision that could be utilized consistent with those national labor pol-

icies promoting the rapid resolution of labor disputes.[22] Three Circuit Courts have specifically rejected application of §10(b) to §301 actions.[23] They rightly concluded that the NLRA's provision was designed to relate only to the initiation of administrative proceedings and not judicial proceedings under a separate federal statute. This uniform approach to the issue of whether §10(b) should be applied to a case akin to the petitioner's is consistent with this Court's holding in *Mitchell*. Consequently, there is no reason for this Court to allow the issuance of a writ of certiorari; there is no conflict or controversy of national significance for the Court to resolve.

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22. In *Sear v. Cadillac Auto Co. of Boston*, 654 F.2d 4 (1st Cir. 1981), the First Circuit did not rest its decision on the applicability of any statute of limitations. However, the court suggested that Massachusett's arbitration vacation limitations period appeared to be applicable to the claims against the company. The court did not consider adoption of §10(b). To the contrary, the Second Circuit specifically considered and rejected the utilization of §10(b) in a §301 action in *Flowers v. Local 2602, United Steel Workers, supra*. The Third Circuit similarly rejected the suggestion of the adoption of §10(b) in *Service Employees Intern. Union, Local No. 36 v. Office Center Services, Inc., supra*, as did the Fourth Circuit in the case at bar and the Fifth Circuit in *Edward v. Sea-Land Service, Inc.*, 678 F.2d 1276 (5th Cir. 1982). The Sixth Circuit implemented the NLRA's limitation period in *Badon, supra*, only after the court determined that Michigan had no applicable limitations provision consistent with Congress' intent that labor disputes be quickly resolved. This decision is in harmony with those of the Seventh Circuit in *Davidson v. Roadway Express, Inc., supra*, and the Ninth Circuit in *Singer* and *Christianson*, which suggest application of local arbitration limitations periods to §301 actions.

23. The Second Circuit in *Flowers*, the Third Circuit in *Service Employees* and the Fifth Circuit in *Edward* each expressly rejected utilization of §10(b) in actions under the Labor Management Relations Act.

III. Retrospective Application of United Parcel Service, Inc. v. Mitchell Is Appropriate

There is no conflict between the circuits concerning whether *Mitchell* is to be retroactively applied. When the issue of retrospective application of the principles enunciated in *Mitchell* have been raised in a timely fashion, the courts of appeal have unanimously supported retroactive application if such action is consonant with the directives of *Chevron Oil Co. v. Huson*, 404 U.S. 91 (1971). It follows then that this Court need not issue a writ of certiorari to determine whether retrospective application was appropriate in this instance.

The decision of the Fourth Circuit in this case is not in conflict with the Ninth Circuit's opinion in *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349 (9th Cir. 1981). The issue of retroactive application of *Mitchell* was not properly before the *Singer* court. In contrast to the present case, in *Singer* the applicability of California's limitations period for actions to vacate arbitration awards of §301 claims was never urged before the district court. As a result, neither that court nor the court of appeals was in a position to confront and resolve the issue on a full record. Consequently, the *Singer* court's discourse on retroactive application of *Mitchell* is non-controlling dicta and simply cannot be held to establish a significant conflict with the holdings of the other courts of appeals.

In this case the lower courts correctly concluded that it was proper to apply Maryland's limitations period for vacating arbitration awards to the petitioner's action. The decision to allow retrospective effect to *Mitchell* was in accordance with the guidelines of *Chevron, supra*. In *Chevron* the Court composed a three-part test to be utilized in deciding whether retroactive application of a ju-

dicial decision is warranted. The petitioner failed to establish that consideration of all these factors in the context of the facts of this case favored prospective-only application.

The *Mitchell* case followed the decisions of several courts that applied state statutes of limitations for actions to vacate arbitration awards to cases brought pursuant to §301, when the substance of those proceedings involved disputes between the same parties, heard and resolved by an arbitration panel. It was neither the intent nor effect of the Supreme Court to overrule or radically change the status of the law with *Mitchell*. As early as 1967 federal courts had been applying similar limitations periods in order to conform with the intertwined national labor policies of encouraging the rapid resolution of labor disputes and ensuring the finality of grievance arbitration awards. At the time when the petitioner's claims could have been timely filed, no federal court decision existed to support Del Costello's contention that he relied on some now-invalid legal principle when he deferred the commencement of his action.

The petitioner had no legal basis to arrive at a determination in 1977 that he could forbear from instituting suit for eight months. However, even if the law had been different, the petitioner was required to demonstrate that he actually relied upon it, rather than merely alleging that such reliance could have transpired. Actual detrimental reliance was absent in the instant case. At no point in the proceedings before the district court did the petitioner indicate that detrimental reliance upon any case holding was undertaken. Therefore, the balance of the equities was rightly struck in favor of retrospective application of *Mitchell*.

The rule to be applied from *Mitchell* and the policy it promotes are one, compelling retrospective application in this case. *E.g., Cash v. Califano*, 621 F.2d 626 (4th Cir. 1980). The Congressionally described need for predictability in labor relations mandates the rejection of claims raised by those who, like the petitioner, might appear even years from now to complain about arbitrations that occurred before *Mitchell* was announced. Deferral to the generally shorter limitations period helps to keep the "law of the shop" workable. Retroactive application of *Mitchell* in this case enhances the policy considerations enunciated by the Court. Accordingly, the lower courts' denial of the petitioner's request for an exemption from retroactive application was appropriate.

The fact that the retroactive application of the rule of law set forth in the *Mitchell* case will deprive the petitioner in this particular action of his opportunity to challenge the grievance committee's award does not create a bar to retroactive application. Faced with this situation, the courts have often denied a litigant's request for non-retrospective application of new case law.

Since the development of a distinct rule on limitations for litigants dissatisfied with an arbitration rule was foreseeable and consonant with the scattered decisions which had addressed the question, the court of appeals and district court correctly concluded that the equities favor retroactive operation of the Court's *Mitchell* decision.

The record below establishes that the District Court for Maryland and the Court of Appeals for the Fourth Circuit gave substantial consideration to this Court's *Chevron* criteria before agreeing to give *Mitchell* retrospective effect. Their well-supported determinations are in harmony with those of other courts of appeals. Therefore,

there is no conflict between the circuits for this Court to resolve, no new important question of federal law for this Court to settle, and no special or important reason for this Court to grant the petitioner's request for a writ of certiorari.

CONCLUSION

The court of appeals' determination is wholly consistent with the decisions of this Court and other federal appellate courts. Therefore, it is respectfully submitted that the petition for a writ of certiorari must be denied or the lower court's decision must be affirmed.

Respectfully submitted,

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No. 81-2386

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

PHILIP DEL COSTELLO

Petitioner

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al., Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals For the Fourth Circuit

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Petitioner raise the issues of a six month limitation period contained in the National Labor Relations Act before the District Court?

2. Is the Petitioner's action time-barred under the six month limitation period contained in the National Labor Relations Act?

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On Petition for Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

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REPLY BRIEF OF PETITIONER

The Petitioner, pursuant to Rules 22.5 and 22.6 of the Supreme Court, files the following Reply Brief to the Respondents' Opposition Brief.

I

The Respondents rely on two patently frivolous arguments in support of their contention that this Court should not take Certiorari. First, the

Respondents contend that the Petitioners did not raise the issue of the six month period of limitations provided by the National Labor Relations Act (29 U.S.C. 160[b]) before the District Court. This is simply not true. After Mitchell was decided on April 20, 1981, the Respondents, on May 5, 1981, again raised the entire issue of limitations. In their Memorandum before the District Court, they pointed out that irrespective of whether the thirty day arbitral limitation period of Maryland, the ninety day arbitral limitation period of New Jersey, or the six month limitation period enumerated in the National Labor Relations Act is applied, the Petitioner is time-barred by reason of failing to initiate his law suit for seven months. Your Petitioner filed a Reply Memorandum before the District Court of Maryland on May 27, 1981, in which he stated (P.23, App. 1) as follows:[1]

> "The Maryland Uniform Arbitration Act or the National Labor Relations Act are the appropriate statutes to apply, if any."

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1. App. refers to original papers filed with the Clerk of this Court.

Also, your Petitioner argued in his Memorandum before the District Court as follows (pp. 26, 27, App. 2, 3):

> "If Mitchell is to be construed and applied so as to mandate the initiation of a suit within 30, 90, or 180 days, whichever be the case, from the arbitration decision of July 19, 1977, in order to preserve the integrity of the arbitral process, the arbitral body, through its authorized agents, are similarly obligated to follow their own rules of procedure by clear and unequivocal notification to the Plaintiff, advising him of exactly when this decision was final and binding."

These contentions were further supported by citing this Court's concurring opinions in Mitchell by Justice Stewart and Justice Blackmun (P. 28 of the Petitioner's Memorandum before the District Court), in which these Judges called for a six month period of limitations. (App. 4)

Furthermore, the Respondents, in support of their contention that the six months limitations issue was not raised cite the Petitioner's argument totally out of context. In their Opposition Brief they quote the following passage from the Petitioner's argument to the District Court (pp.16,17):

"While it would be presumptuous to expect this Court to promulgate new national policy establishing six month limitations for all 301 actions, it is quite appropriate for the Plaintiff to assert that the thirty day limitation period is unreasonably short."

Regrettably, the Respondents failed to quote the entire paragraph in which this passage is contained. The entire paragraph of your Petitioner's Memorandum before the District Court provides as follows (P.29, App. 5):

"While it is clear that Mitchell sanctioned the New York ninety day limitation period in 301 cases, it is respectfully suggested that the thirty day limitation period in Maryland is an unreasonably short time-bar. This proposition is supported by the concurring opinions in Mitchell, which would establish a six month period of limitations for filing 301 actions. The Mitchell court, at footnote 2, stated that they declined to consider the six month limitation period because the Respondent filed his claim beyond the six month period and therefore the issue is not before them, and in any event, the claimant would be barred even if the six month period were the law. While it would be presumptuous to expect this court to promulgate new national policy establishing six month limitations for all 301 actions, it is quite appropriate for the Plaintiff to assert that

the thirty day limitation period is unreasonably short."

It is respectfully asserted that this entire argument was made within the context of that portion of the Petitioner's argument seeking a judicial declaration that thirty days was unreasonably short. It in no way constituted a waiver or abandonment of the six month limitation period contained in the National Labor Relations Act. This argument was appropriately tailored to the concerns of a District Court Judge who was understandably reluctant to promulgate national policy. Furthermore, in the Petitioner's Brief before the Fourth Circuit Court of Appeals, the issue of the six month limitation period was again raised on pages 34 through 38 of his Brief (App. 6--10), to which the Respondents replied on pages 41 through 45 of their Reply Brief (App. 11--15). Nowhere in their Reply Brief is there any contention of the Petitioner's failure to raise the issue of the six month limitation period.

It is well established that in federal practice

any question which has been presented to the Federal District Court for ruling and which has not thereafter been waived or withdrawn is preserved for review.

> United States of America v. Harue Hayashi, 282 F.2d. 599, 9th Cir., August 16, 1960; see also Strikler v. Pfister Associated Growers, 319 F. 2d. 788, and Valdecker Packing Co. v. Corn Product Sales Company, 411 F.2d. 850, 6th Cir., 1969.

Therefore, the contention that the Petitioners did not raise the six month period of limitations contained in the National Labor Relations Act is patently frivolous.

II

The Respondents also argue that since the Petitioners filed their action on March 16, 1978, approximately seven months from the date of the arbitral hearing on July 19, 1977, the six month period of limitations could not save this cause of action. Your Petitioner filed an affidavit before the District Court, to which the Respondents, with time and opportunity to do so, never

replied. (App. 16, 17) The factual allegations of the Petitioner's affidavit, which were accepted by the District Court as true. (See Del Costello v. I.B.T.,et al., 526 F.Supp. 725.) In substance, alleged that the Petitioner was reasonably led to believe, to his detriment, by the Respondents that the arbitral award was not final until December of 1977. Further, under the facts as alleged in the affidavit, both Respondents engaged in a course of conduct which reasonably led the Petitioner to believe, to his detriment, that there was a distinct possibility for re-hearing and for reinstatement due to the fraudulent conduct of the Respondent employer, and that under the rules of the arbitral body, the entire testimony of the employer's only witness was inadmissible. (App. 16, 17)

The net effect of these factual allegations, if true, presented the trier of fact with the issue of (1) finality of the award, (2) estoppel and waiver of the limitations defense by the Respondents, and (3) tolling of the limitations period from

July 19, 1977, to December of 1977. More importantly, the District Court, in its written opinion of October 22, 1981 (524 F.Supp. 725, Jones,J.), stated unequivocally:

> "As previously noted, it may well be that the Plaintiff's tolling argument has merit, and I have here assumed for the purpose of deciding the Motion (Respondent's Motion for Reconsideration of May 5, 1981) that the limitation period began to run in December of 1977."

Obviously, the District Court then applied the thirty day Maryland Statute of Limitations (Courts and Judicial Proceedings Article, Annotated Code of Maryland, Section 3-224) from December of 1977, and held the action time-barred because it was filed ninety days later, on March 16, 1978.

However, if, indeed, six months is the appropriate limitation period, rather than thirty days, this case would have been filed in a timely manner for purposes of meeting the defense of summary judgment.

The questions of estoppel, waiver, finality and tolling are factual matters for the trier of fact to address, and are not relevant for

consideration by an appellate court. More particularly, all allegations of fact and all reasonable inferences arising therefrom, must be presumed to be true and construed in a light most favorable to the party opposing the motion.

> Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1969).

If the Respondents desired to resolve these factual disputes, they should have done so by filing an appropriate reply affidavit coupled with subsequent discovery, which they failed to do despite the express invitation of your Petitioner. (See Petitioner's Memorandum in District Court of August 6, 1981, p. 1, App. 18.)

The tolling question of limitations was addressed in the case of Smart v. Ellis Trucking, 580 F.2d. 215, 219, Certiorari denied, 6th Cir., C.A. 1978, 440 U.S. 958 (1979), which held:

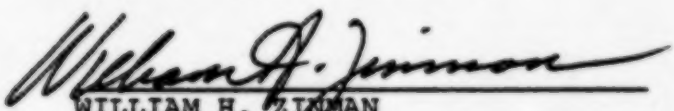
> "Although more than three years elapsed between the Appellant's discharge anf filing of his complaint, we think it only fair that the Statute of Limitations be tolled from the time the grievance was filed until it

was finally rejected."

For these reasons, the Petitioner vigorously asserts, as he did in his original Petition, that this case is in a posture for remand and trial if this Court adopts the six month limitations period contained in the National Labor Relations Act.

Finally, it is respectfully urged that this case uniquely lends itself to a resolution of the entire limitations question in all fair representation suits because both the union and the employer, unlike Flowers (A. 81-2408) are both party defendants.

Respectfully submitted,



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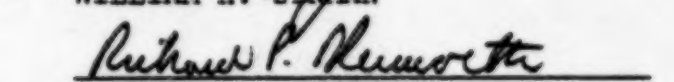

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OCTOBER TERM, 1982

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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations, a federation of 99 national and international unions with a total membership of 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The petition in this case, and the petition in *United Steelworkers of America v. Flowers*, No. 81-2408, proffer identical issues as to the time limits governing hybrid

breach of collective bargaining agreement/breach of duty of fair representation actions—issues that are important to all labor unions. The AFL-CIO's interest in the resolution of those issues is reflected by its participation in *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n. 2, and by its support of the petition in *Flowers*, see Petition in No. 81-2408 at pp. 1-2. The Federation files this brief *amicus curiae* to show that *Flowers* is a better vehicle than the instant case for addressing the issues presented.

ARGUMENT

Two petitions for certiorari are pending before this Court that on their face present identical issues as to the time limits governing hybrid breach of collective bargaining agreement/breach of duty of fair representation actions: *United Steelworkers v. Flowers*, No. 81-2408, and the instant case. We believe that there can be no doubt, in light of the substantial circuit conflicts that have developed on both issues in the wake of *United Parcel Service v. Mitchell*, 451 U.S. 56, and the volume of cases pending in the federal courts whose outcomes depend upon the resolution of those conflicts, that this Court should address those issues this Term. But the choice as to *which* petition is granted could determine whether those issues are in fact resolved.

The two issues (described below) that have divided the lower courts in the wake of *Mitchell* both are squarely presented in *Flowers*. In contrast, there is substantial uncertainty whether one of these issues—indeed, the issue that logically should be addressed first—is squarely presented in the instant case. In consequence, a grant of certiorari in this case rather than in *Flowers* might disserve the interest in securing a definitive resolution of those issues this Term.

The issues proffered in both petitions are: (1) whether the six-month time limit of § 10(b) of the National Labor Relations Act, as amended, controls the timeliness of

hybrid breach of collective bargaining agreement/breach of duty of fair representation actions, and (2) if not, whether state arbitration time limits—which the *Mitchell* Court held applicable to such actions against *employers*, at least where § 10(b) is not invoked by the defendants—also applies to such actions against *unions*. Logically, the § 10(b) issue should be addressed first, for if, as we believe to be true, federal law provides a uniform applicable time limit for all cases brought by employees against unions and employers challenging the resolution of a grievance in the contractual grievance-arbitration system, then there is no occasion to look to state law at all.[1]

There is a substantial question, however, whether § 10(b) issue is adequately raised in the instant case. The petitioner in the instant case—the party asserting the applicability of § 10(b)—is the plaintiff. But this suit was filed more than six months after the final disposition of petitioner's grievance, and it is not self-evident, therefore, that a holding that § 10(b) is applicable (the holding petitioner seeks) would warrant a reversal of the decisions below dismissing petitioner's complaint as untimely.

Petitioner does contend that he is entitled to tolling for a portion of the period between the grievance disposition and the filing of suit, and that such tolling would render his complaint timely under § 10(b). But the district court did not decide the tolling question, believing that tolling could not affect the timeliness of this suit (*Del Costello* Pet. App. at B-18-19). The district court so be-

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[1] In *Mitchell*, this Court recognized the possibility that § 10(b) might be applicable to such actions, but declined to resolve the question because the parties had not raised § 10(b) either in the lower courts or in their briefs to this Court. See 451 U.S. at 60, n. 2. Instead, the Court resolved only the question posed by the parties: on the assumption that the applicable time limit was to be borrowed from state law, *which* state time limit should be borrowed?

lieved because nobody was championing § 10(b)'s applicability in the district court, and that court thus understood the choice to be between two state time limits: one of 30 days, and the other of three years (*id.* at B-17). On that understanding, tolling was irrelevant, for petitioner's action was filed less than three years after the grievance disposition and "[e]ven assuming that limitations did not begin to run" for the period of tolling claimed by petitioner "this action was filed more than 30 days after that time" (*id.* at B-19).[2] The district court found the 30-day time limit applicable, and dismissed petitioner's suit. On appeal, petitioner *did* champion applicability of § 10(b), but the court of appeals affirmed "on the basis of [the district court's] memorandum and order" (*id.* at B-2), without alluding either to § 10(b) or to the unresolved tolling question. In these circumstances, it is far from clear that the § 10(b) issue is appropriately presented in this case.

In contrast, that issue is squarely presented in *Flowers*. There, suit was filed eleven months after the arbitration decision, and there is no tolling claim. It is the defendant union that invokes § 10(b), contending that that is the controlling time limit and that the complaint accordingly was untimely. The Court of Appeals squarely ruled on that issue, rejecting the applicability of § 10(b) and rejecting as well the applicability of the 90-day state arbitration statute which the union asserted as the alternative basis for dismissal. That court held that a three-year state statute governing non-medical malpractice actions applied and accordingly that the complaint was timely filed.

In sum, a grant of certiorari in *Flowers* would assure the orderly disposition, in their proper order, of the time

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[2] The petition herein at pp. 7, 8-9, states that the district court resolved the tolling issue in petitioner's favor. Reference to this district court's opinion, however, establishes that the court did *not* resolve that issue (*Del Costello* Pet. App. at B-19, B-27).

limits questions presented in this case and in *Flowers*. This Court would be able to address first the question whether § 10(b) applies, and, if that section does not apply, to then address the question whether the union is entitled to the benefit of the state arbitration time limit. A grant of certiorari in the instant case instead would provide substantially less assurance that the § 10(b) question would be resolved, and could lead to another situation, as in *Mitchell*, wherein this Court winds up addressing only the logically subordinate question of which state statute is to be borrowed in those situations where the § 10(b) issue is not squarely presented.

CONCLUSION

For the reasons set forth above, this Court should grant the petition in *United Steelworkers of America v. Flowers*, No. 81-2408, and hold the petition in the instant case pending disposition of *Flowers*.

Respectfully submitted,

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NO. 81-2386

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PHILIP DEL COSTELLO,

Petitioner

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

(1) Is the state arbitral limitations period explicated in United Parcel Service v. Mitchell, 451 U.S. 56 (1981) applicable to both the Company and Union when a fair representation suit is filed against both of them?

(2) Should the limitations period for bringing fair representation suits be borrowed from the National Labor Relations Act rather than state statutes for vacating arbitration awards?

(3) Assuming arguendo that the federal statutes are not the appropriate limitations periods, should this Court's Decision in United Parcel Service v. Mitchell, 451 U.S. 56 (1981) be given prospective or retrospective effect?

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PARTIES IN THE COURT OF APPEALS

Petitioner, Philip Del Costello, was the Plaintiff before the United States District Court for the District of Maryland and Appellant before the Court of Appeals for the Fourth Circuit.

Anchor Motor Freight, Inc., was one of the defendants in the District Court. The other defendants were Local 557 of the International Brotherhood of Teamsters and International Brotherhood of Teamsters.

On appeal before the Fourth Circuit Court of Appeals, defendant Employer and defendant Local 557 were appellees.

NO. 81-2386

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

PHILIP DEL COSTELLO,
Petitioner

v.

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, et al.
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

Petitioner, Philip Del Costello, hereby submits his brief on the merits in the above matter.

OPINIONS BELOW

The opinion of the United States District

Court for the District of Maryland (B-3-29)[1] granting Defendants' Motion for Summary Judgment has been officially reported in 524 F.Supp. 721 (1981). The opinion of the United States Court of Appeals for the Fourth Circuit B-1 and 2, confirming District Court has not been officially reported.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1981 (B-1).[3] On June 29, 1982, within 90 days of the date of the Court of Appeals decision, Philip Del Costello filed a timely appeal for a Writ of Certiorari pursuant to 28 USC 210 (1)(c), Supreme Court Rules 20.2 and 20.4.

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[1] Denotes pages in the Petition for Writ of Certiorari.

[2] Denotes pages in the Petition for Writ of Certiorari.

[3] Denotes pages in the Petition for Writ of Certiorari.

The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 301(a) of the Labor Management Relations Act of 1947, 29 USC 185(a) provides, in pertinent part, as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 160(b) of the National Labor Relations Act of 1947 provided, in pertinent part:

> "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board... ."

Section 5-101 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, in pertinent part, provides:

> "A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."

Section 3-224 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, in pertinent part, provides:

> "(A) Petition (1) except as provided in ¶(2) a petition to vacate the award shall be filed within 30 days after delivery of a copy of the award to the petitioner; (2) if a petition alleges corruption, fraud, or other undue means, it shall be filed within 30 days after the grounds become known or should have been known to the petitioner."

Section 3-206(b) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, in pertinent part, provides:

> "(B) Agreement between employer and employees of this subtitle does not apply to an arbitration agreement between employer and employees or between their respective representatives unless it is expressly provided in the agreement that this subsection shall apply."

STATEMENT OF THE CASE

Petitioner Philip Del Costello began working for Anchor Motor Freight as a car hauler after his tour of duty in Viet Nam in 1973.

Dissatisfied with the representation provided by Local 557, locally, and by the Teamsters nationally, Del Costello was an active member of PROD, a national organization of dissident Teamsters. He was particularly active in campaigns to improve truck safety.

On June 27, 1977, Del Costello was assigned to drive a load of automobiles from Baltimore to Montreal, Canada. Before beginning his journey, Del Costello performed the pre-trip inspection required by federal regulations. Barrentine v. Arkansas Best Freight, Inc., 101 S.Ct. 1437 (1981). He noticed a large number of safety defects, including the ratchets which hold the cars down onto the truck. Because Del Costello had previously

been injured by defective ratchets, he refused to take a truck in that condition. (JA 75) The company supervisor refused to correct the most serious of these problems, despite the urgings of his own mechanic. (JA 16, 74) Del Costello offered to take any other truck on the premises (JA 17), but the company was adamant. When Del Costello persisted in his refusal, he was promptly fired. (If the incident occurred today, he would be protected by the Truck Safety Act of 1982 §405(a).[a] Del Costello also filed a charge with the National Labor Relations Board accusing Anchor of discharging him because of his dissident activities. The Board deferred the charge because a grievance was pending following the doctrine of Collyer Insulated Wire, 192 NLRB 837, 77 LLRM 1931 (1971).

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a. Conference Report HR-6221 Congressional Record, December 21, 1982, adopted by the House of Representatives on December 21, 1982; adopted by the U.S. Senate on December 23, 1982.

He then filed a grievance which was not resolved by an informal meeting between Business Agent Morningstar and company officials (JA 18).

Accordingly, a second level hearing was scheduled on July 19, 1977, less than a month after his discharge in Atlantic City, New Jersey, at a meeting of the Eastern Conference Joint Automobile Transporters Committee. (JA 27,70-79). The Joint Committee consisted of an equal number of union and company representatives. (JA 70) Prior to the hearing, Morningstar conducted no investigation of the facts (JA 24, 81, 82) and, at the hearing Del Costello was only permitted to read a one page statement. (JA 73-76) Morningstar also refused Del Costello's request long before the hearing to call as a witness or obtain a statement from the mechanic who had told the company that it must repair the truck properly. (JA 24, 25) The only evidence introduced by the company was a

statement by a company supervisor who was not present during Del Costello's dispute with the company. (JA 27, 81)

Although the Joint Committee's rules forbid the introduction of this kind of hearsay testimony (JA 98), Morningstar refused to object to this testimony. (JA 70-79, 31) After the Committee upheld his discharge, Del Costello received a letter from Morningstar on August 19, 1977, leading him to believe that the Joint Committee decision was not final (JA 64,65,69) The letter invited him to make any desired additions, deletions, or corrections to the enclosed minutes, in writing, by September 20, 1977, when the Eastern Conference was scheduled to meet. Otherwise, the minutes would be approved as is. (JA 64, 65, 69)

Del Costello complied with this request by his letter of September 14, 1977, to Morningstar (JA 80-84), in which he objected

to excludible hearsay testimony which was the only evidence against him. (JA 81)

The failure of the Union to respond to this letter impelled the District Court to conclude that limitations for the purpose of deciding the motion for summary judgment was tolled until December of 1977 (Petition for Writ of Certiorari B-27). Del Costello promptly filed this action on March 16, 1978, only eighty-eight days after he learned from Morningstar that the Joint Committee's action was final. (JA iii,159) On October 22, 1981, the District Court granted the respondents' motion for summary judgment, holding that limitations began to run in December of 1977 and applied the Maryland 30-day statute for vacating arbitral awards as to both the company and the union (Petition for Certiorari B-16-29). The U.S. Court of Appeals for the Fourth Circuit affirmed the decision of the District Court in

an unpublished opinion on April 19, 1982 (Petition for Certiorari, B-1 and 2).

SUMMARY OF ARGUMENT

I. This Court should adopt the six month limitation period in ¶10(b) of the National Labor Relations Act because the hybrid cause of action in this case is judicially implied from the National Labor Relations Act. The adoption of a six month limitation period would enhance the policy of rapid disposition of labor disputes, and would achieve uniformity and stability in collective bargaining relationships.

However, if this Court believes it is bound to adopt a state statute of limitations, it should borrow a limitations period such as the state tort statute that does not effectively eviscerate the cause of action.

II. If this Court selects the state arbitral limitations period, such statute should

be applied perspectively because when petitioner's cause of action arose, a substantial number of circuit, district and state appellate courts applied the tort/contract limitations period based upon this Court's decisions in Auto Workers v. Hoosier Cardinal, supra, 383 U.S. 696 (1966)and Hines v. Anchor Motor Freight, 424 U.S. 554 (1976), which did not foreshadow the decision in UPS v. Mitchell, 451 U.S. 56 (1981), which was a case of first impression before this Court.

Since the petitioner filed suit in an expeditious manner within two-and-a-half months after he had reason to believe his cause of action arose, it would be extremely unfair to terminate his claim by retrospective application of any limitations period.

I. ARGUMENT

THE LIMITATION PERIOD FOR BRINGING A HYBRID CAUSE OF ACTION ALLEGING BREACH OF DUTY OF FAIR REPRESENTATION AND BREACH OF CONTRACT SHOULD BE BORROWED FROM §10(b) OF THE NATIONAL LABOR RELATIONS ACT. (29 USC §160(b)).

The District Court concluded that the most appropriate state statute of limitations which applies to both the union and the employer was the Maryland 30-day limitation period contained in §3-224(a) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland for the vacating of arbitral awards.

The petitioner shall demonstrate that the District Court was in error, and that §10(b) of the NLRA provides the applicable statute of limitations for such claims. The question of whether §10(b) or a state limitations period applies to this hybrid cause of action was expressly left open by this Court in United Parcel Service v. Mitchell, 451 U.S., at page

60, fn.2.[1]

Where the cause of action, as in the present case, is judicially implied from the NLRA, Vaca v. Sipes, 386 U.S. 171 (1967), and enforceable through the Labor Management Relations Act of 1947 which does not contain a limitation period for private causes of action, the Court should look to the closest analogous statute for purposes of selecting the appropriate limitations period. Auto Workers v. Hoosier Cardinal, 383 U.S. 696 (1966), commenced this process of characterizing actions for suits

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[1] The American Federation of Labor and Congress for Industrial Organizations has filed a Brief arguing that in cases such as the present, Courts should apply the six month limitation period found in 10(b) of the NLRA 29 USC 160(b). The AFL-CIO distinguishes UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), in which the Court had applied state law to a 301 claim on the ground that Hoosier Cardinal involved a 301 action by a union against an employer, while actions brought by employees was against both union and employer .... are hybrid

initiated under §301 of the LMRA. Hoosier involved a straight breach of contract damage suit brought by a union against an employer which did not proceed through the arbitral process unlike the present case which did proceed through an "arbitral process".

This Court, in Hoosier, supra, declined to judicially create a uniform limitations statute for all 301 actions, indicating that the selection of the contract limitations period was limited to the facts before them, and the Court added the following caution for future cases:

> "THE PRESENT SUIT IS ESSENTIALLY AN ACTION FOR DAMAGES CAUSED BY AN ALLEGED BREACH OF AN EMPLOYER'S OBLIGATION EMBODIED IN A COLLECTIVE BARGAINING AGREEMENT. SUCH AN ACTION RESEMBLES AN ACTION FOR BREACH OF CONTRACT COGNIZABLE AT COMMON LAW.

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fn.1 cont'd.
breach of duty actions, the union's duty being implied from the NLRA. "We decline to consider this argument since it was not raised by either of the parties here or below."

> WHETHER OTHER 301 SUITS DIFFER FROM THE PRESENT ONE MIGHT CALL FOR THE APPLICATION OF OTHER RULES ON TIMLINESS, WE ARE NOT REQUIRED TO DECIDE, AND WE INDICATE NO VIEW WHATSOEVER ON THAT QUESTION (383 U.S. at 705, n.7).

In this case, Del Costello's discharge was submitted to a joint committee under the labor management contract, and resolved against him, giving rise to his claim against the union for breach of its fiduciary duty of fair representation and an action against the employer, Anchor, for alleged conduct resulting in a breach of the labor management contract. As this Court has recognized, the plaintiff's two claims have entirely different statutory sources and jurisdictional bases -- the duty of fair representation is implied from the NLRA and the breach of such duty may constitute an unfair labor practice. International Brotherhood of Electrical Workers v. Foust, 442 U.S. 48, note 8 (1978). Syres v. Oil Workers, 350

U.S. 892 (1955). Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). Vaca v. Sipes, 386 U.S. 170, at p. 177 (1967). Furthermore, this Court, in United Parcel Service v. Mitchell, supra, at 451 U.S. p. 63, recognized:

> "That the duty of fair representation is more a creature of labor law as it is developed since the enactment of §301 than it is of general contract law."

Justice Stewart, in United Parcel Service v. Mitchell, supra, at 451 U.S. p. 67, demonstrated why the application of 10(b) to fair representation claims accords with Congressional intent. He noted that 10(b) reflects the Congressional judgment as to the appropriate limitations period for unfair labor practice claims, in Mitchell, supra, 451 U.S. at p. 67, and observed that the Labor Board has ruled, with approval of a majority of the Court of Appeals, that all violations of the duty of fair representation are unfair labor practices,

and thus are the very type of wrongs as to which 10(b) controls; ibid., at p.67-68, n.3. Justice Stewart reasoned that:

> "[E]ven if there were some breaches of the representation duty that are not unfair labor practices under the NLRA, 10(b) is the proper source for determining when claims of breach of duty must be raised. For that limitation period is a clear indication of Congressional judgment of when claims of a very similar or identical character must be brought."

Justice Stewart's analysis, we submit, indeed is persuasive.

> "It is well established that in determining what limitations period to apply to a federal cause of action, that the court's task is to ascertain Congressional intent. When state limitations periods have been followed for federal claims, it has been because the court has ... inferred from Congress' failure to specify a limitations period]. Congress intended that local time limitations should apply."

Occidental Life Ins. Co. v. EEOC, supra, 434 U.S. at p. 367; and it makes no sense, as Justice Stewart explained in Mitchell, to "assume

here that Congressional silence reflects an intent to apply state statutes of limitations to a fair representation claim.[2]

This is not a situation in which Congress has expressly created a cause of action but failed to state the applicable limitations period. Here Congress has not expressly legislated a fair representation cause of action; rather, the cause of action has been judicially

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[2] Concededly, the terms of 10(b) are directed to the administrative procedures provided by Congress to resolve unfair labor practices. But the fact that Congress did not provide a limitations period for a judicially enforced labor action later found implied in the NLRA is not comparable to a Congressional failure to establish a time limitation for an action it expressly creates by statute. Cf. Occidental Life Ins. Co. v. EEOC, 432 U.S. 255-57. It indicates it cannot reasonably be assumed here that the Congressional silence reflects an intent to apply to state statutes of limitations for an action based in part on rights and obligations traceable to the NLRA. (Ibid., at 451 U.S. 68 n.4;emphasis added.)"

implied from the NLRA.[3] The absence of an express statute of limitations in the NLRA for the implied fair representation cause of action is, thus, hardly surprising, and it surely provides no basis for inferring that Congress intended state limitations to apply. Moreover, it is important to recall that the fair representation cause of action has been implied from the NLRA on the same theory that underlies all implied causes of action: that Congress intended to create the private remedy. Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 99 (1981). Touche Ross & Co. v. Redington, 442 U.S. 560, 568. Transamerican Mortgage Advisors v. Lewis, 441, U.S. 11 (1980).

[3] This court has used federal statutes of limitations to other judicially implied causes of action. McAllister v. Magnolia Petroleum, 357 U.S. 221, 228, Brennan, J., concurring. See also Note--Limitations Borrowing in Federal Courts, 77 Michigan Law Review, 1133, 1134, 1148 (1979).

The same reasoning that has led the courts to conclude that in enacting the NLRA, Congress impliedly intended to create a cause of action of breach of the duty of fair representation compels the conclusion that Congress intended to apply to that cause of action the same limitations period that the legislation expressly applies to all causes of action it expressly creates: the six months limitations period of 10(b). To repeat Justice Stewart's words: "that limitations period is clear indication of Congress' judgment of when the claims of a very similar or idential character must be brought."

Indeed, any other conclusion would lead to the anomalous result of a different limitations period being applied to the same claim, depending on whether the employee elects to pursue the claim before the NLRB or the courts. Moreover, Justice Stewart noted, decisions of the NLRB and of the Courts of Appeals make it

clear that a fair representation claim is presented to the NLRB for resolution as an unfair labor practice, the six months limitations period of 10(b), by its terms, is applicable. There is no basis for attributing to Congress an intent to create fifty different and expansive as well as restrictive limitations periods determined by state law when the very same claim is presented in court rather than before the Board.

While the breach of contract claim is enforceable under §301 of the Labor Management Relations Act of 1947, the alleged conduct of Anchor in terminating Del Costello's employment for refusing to drive an unsafe truck could be viewed as an unfair labor practice under the NLRA also. See NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962). See also Vaca v. Sipes, 386 U.S. at 183, 196, fn. 18. Hines v. Anchor Motor Freight, 424 U.S. 554, 562 (1976) and

Labor Law Journal, August 1982, pp. 483-486, fn. 3, "Duty of Fair Representation for Statute of Limitations in Fair Representation Cases," by J.E. Grenig, Marquette University Law School.

Accordingly, Del Costello's claims against the union and the company are by their very nature individual, yet interrelated, if not interdependent.

> "To prevail against either the company or the union, petitioner must not only show that their discharge was contrary to the contract, but must also carry the burden of demonstrating the breach of duty by the union."

Hines v. Anchor Motor Freight, 424 U.S. 554, 570, 571 (1976). Thus, it can be demonstrated that the hybrid Del Costello suit arising out of the arbitral process when compared to a Hoosier claim does not resemble a common-law action for breach of contract, but is derived from a synthesis of §301 of the LMRA and the NLRA, as amended, which, under §10(b), contains

a limitations period of six months for initiating unfair labor practices, and for the following reasons should be the applicable limitations period governing suits such as Del Costello's.

Del Costello's case, unlike Hoosier, involves those consensual processes that federal labor law is chiefly designed to promote, namely -- the formation of collective bargaining agreements and the private settlement of disputes under it -- which have broken down. Hoosier Cardinal, supra, 383 U.S. 702, and Mitchell, supra, 451 U.S., at p. 66, Stewart, J., concurring opinion.

Therefore, at the outset, the essence of this lawsuit is shaped by NLRA principles designed to serve the goals of a functioning collective bargaining relationship and sharply differs from a common-law contract damage suit.

In addition, several policy considerstions require use of the NLRA limitations period

contained in 10(b). This Court, in Vaca, supra, established individual substantive rights through a hybrid cause of action that is exposed to the danger of extinction by the application of state arbitral statutes of limitations such as Maryland's 30-day limitation period, §3-224(a) of Courts and Judicial Proceedings Article of the Annotated Cose of Maryland.[4]

Justice Stewart, in Hoosier, supra, by way of dicta, fn. 9, 383 U.S., at p. 707, strongly hinted that state statutes of limitation which were either too long or too short

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[4] 1. Thirty states and the District of Columbia have a 90-day statute of limitations. 2. Three states have longer statutes than 90 days: (a) California has 100 days; (b) New Hampshire has 1 year; (c) Missouri has 1 year. 3. Six states have no time limitation whatsoever, including Vermont, Virginia, West Virginia, North Dakota, Tennessee, and Georgia. 5. One state has a limitation period for the term of court: Nebraska. (See UPS v. Mitchell, 451 U.S. 63, 64 - fn. 5).

would not comport with federal policies controlling 301 actions such as, for example, 60-day statute governing wages.[5] However, direct appeals by a company or union to vacate an illegal award[6] within the context of an appropriate

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[5] "Other questions would be raised if this case presented a state law characterization of a 301 suit that reasonably described the nature of the cause of action, but required the application of an unusually short or long limitation period, such as New Mexico's 60-day statute of limitations governing wages."

[6] Grounds upon which the Court, in a direct appeal, may intervene to set aside or vacate arbitral awards exist where (1) the arbitrator has fully exceeded the scope of statutory authority, either because (a) the award follows an illegal act, citing Glendale Mfg.Co. v. Local 520 ILUG, 228 F.2d 936, 6th Cir.(1960), or (b) the award violates public policy; Black v. Cutter Laboratories, 43 CA 2d 788, or (c) where the award draws its essence outside the collective bargaining agreement, U.S. Steel Workers v. Warrior and Gulf Navigation Co., 363 U.S. 574; Torrington Mfg. Co. v. Metal Products Workers Local, 362 F.2d 677; Ludwig-Harold Mfg. Co. v. Fletcher, 405 F.2d 1123, or (d) where the arbitrator was personally actuated by fraudulent or corrupt motives. In all these cases, the courts do not review the merits of the award or the request of the union or the

limitations period are markedly different than the initiation of a hybrid suit, as in the present case. In the former, the parties, who are usually represented by counsel or experienced labor management personnel, and being familiar with the proceedings, preserve their rights by filing an appeal within the statutory period as a matter of course. However, in the latter case, the hybrid action is an entirely different species of litigation. Under the labor management contract and rules of procedure of the Eastern Conference and Teamster constitution, as in the Del Costello case, a lawyer is absolutely prohibited from representing a claimant before the joint committee. The Eastern Conference rules of procedure prohibit any party unassociated either with the company

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6 - cont'd:
company, but simply determine whether the arbitrator acted within the perameters of his authority and granted both parties a fair hearing.

or with the union for a period of 18 months from representing either the company or the union at a discharge meeting. From a legal as well as a practical standpoint, the employee must rely upon his business agent to investigate and then present his claim at the arbitral hearing. When a breach of the fiduciary duty arises during the course of this representation, as in the instant case, an aggrieved employee requires at least six months within which to recognize, investigate, and thereafter pursue his remedies through counsel. Often a hostile business agent in tandem with a corrupt employer combine in a variety of ways to obstruct, if not prevent, an employee from obtaining vital and pertinent information necessary to apprise him of his rights, after which counsel must then determine whether the operative facts rise to the level of a breach of duty of fair representation. To require an

unemployed and uninformed layman to institute suit within three months, thirty days, or as little as one day, as required by arbitral statutes of at least 44 states, including Maryland, is palpably unreasonable. The application of such short statutory periods invariably operates to eviscerate the employee's substantive rights.[7]

Frequently, the unsuspecting employee will be deprived of his or her day in court before the employee has even sought legal

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[7] Wilson v. Iseminger, 185 U.S. 55, 62 (1902).

All statutes of limitations must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute should not bar existing rights of claimants without affording him this opportunity ; if it should attempt to do so, it would not be a statute of limitations but an unlawful attempt to extinguish rights arbitrarily whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action.

advice.[8] This is particularly true where the limitations period is thirty days or less.

Another reason why 10(b) should be adopted is mandated by the need to promote stability in the arbitral process, which is at the very heart of the system of industrial self-government. U.S. Steelworkers v. Warrior Gulf Navigation Co., 363 U.S. 574, 578 (1960). Justice Stewart, in his concurring Opinion in Mitchell, supra, 451 U.S., at p. 68, addressed this policy in the following language:

> "Congress enacted 10(b) of the NLRA to protect continuing collective bargaining systems from delayed attack. The six month bar of 10(b) is designed to strengthen and defend the "stability" of bargaining relationships. Machinists v. NLRB, 362 U.S. 411, 425. The time limitation

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[8] Labor Law Journal, "The Duty of Fair Representation, the Statute of Limitations in Fair Representation Cases" (August 1982), by Jay E. Grenig.

reflects the balance drawn by Congress, "the expositor of the national interest", ibid., at 429, between the interest of employees in redressing grievances and vindicating (their) statutory rights", ibid., and the interest "in industrial peace, which is the overall purpose of the act to secure." Ibid. See also Local Lodge No.1424 v. NLRB, 362 U.S. 411, 428, 429 (1960).

Justice Stewart then concluded that these policies apply with equal force in the context of this hybrid cause of action:

> "In 10(b) of the NLRA Congress established a limitations period ultimately viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system. That is precisely the balance at issue in this case. The employees' interest in setting aside the "final and binding" termination of a grievance through the method established by the collective bargaining agreement unquestionably implicates "those consentual processes that federal labor law is chiefly designed to promote -- the formation of the

agreement and the private settlement of disputes under it." Hoosier, 383 U.S., at p. 702. "Accordingly, the need for uniformity among procedures followed for similar claims; ibid.,[9] as well as the clear Congressional indication of the proper balance between the interest at stake, counsels the adoption of 10(b) of the NLRA as the appropriate limitation period of law suits such as this."

Finally, we submit that the continuing use of state arbitral statutes under the present state of law has resulted in chaos as well as unnecessary appellate litigation because six states (App. 58) have absolutely no time limitation in their arbitral statutes for vacating arbitral awards.[10] Courts in these states are faced with the choice of selecting

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[9] Title VII, Civil Rights Act of 1964, 42 USC 2000(e)-5(e). Age Discrimination in Employment Act, 29 USC 626(c).

[10] Tennessee, West Virginia, Virginia, North Dakota, Vermont, and Georgia.

either the state tort statute or the state contract statute, thereby doing violence to the policy in Mitchell, supra, which mandates rapid resolution of labor disputes. Ten states have enacted arbitral statutes[11] (App. 58) which by their terms are expressly inapplicable to labor disputes. The United States Court of Appeals for the Sixth Circuit has adopted 10(b) to a fair representation case. Badon v. General Motors Corp., 679 F.2d 93, 6th Circuit (1982). It offends logic to put the courts in these remaining nine states to the Hobson's Choice of applying their arbitral statutes which effectively deprive the employee of his day in court, or alternatively selecting the tort or contract statute that flouts the rapid resolution policy enunciated in Mitchell, supra. Moreover, in

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[11] Alaska, Arkansas, Idaho, Kansas, Louisiana, Maryland, South Carolina, Texas, Washington, and Michigan.

the vast majority of the remaining states, these arbitral statutes were enacted, either prior to the development of the fair representation doctrine or for the purpose of resolving commercial disputes, and state legislatures did not consider the policies underlying the fair representation doctrine.[12]

As a consequence, when a court is required to select amongst and between the statutes, confusion and chaos abounds. The adoption of the six month limitation period contained in §10(b) will establish a definite, certain, and uniform time period and will operate to eliminate

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[12] Alabama Code, 6-6-15, enacted Title 7 §8, §2 (1940). Georgia Code Ann. 9-9-51, enacted 7-219-7-220 (1933). Nebraska Rev. Stat. 25-2114, enacted C.S. 9183 (1929). New Jersey Stat. Ann. 2A-24-7, enacted C.134, §7 (1923). New York Civil Procedure L.R. 7511, enacted L. 1937 C.341 (1937). N.D. Century Code Ann. 32-29-10, enacted 8336 (1913). Oregon Rev. Stat. 33.310, C.86, §5 (1925). Rhode Island 10-3-15, enacted P.L. 1929, Chapter 14J8, §12. Tennessee Code Ann. 29-5-112, 29-5-13, enacted Ann. 9375 (1932). West Virginia 55-10-3, enacted L.108, §1 (1923).

these problems.

If this Court rejects 10(b) of the NLRA, we submit that the appropriate statute of limitations should be the general tort statute for both the company and the union. We subscribe to the theory that once the breach of duty of fair representation occurs, it effectively taints the entire arbitral process, rendering the arbitral award a nullity. Furthermore, a decision by this Court establishing the longer period of limitations for the union and a shorter period for the company, as in Steelworkers v. Flowers, 671 F.2d 72, Second Circuit (1982), would invariable undercut the employee's remedy for damages. In Vaca, supra, the right to recover back pay, pension benefits and seniority, if not the job itself, represents substantially all of the relief available to the employee which can only be recovered against the company. Thus, a limitations period that

that would keep the claim alive against the union while at the same time terminating the right against the company, serves little or no purpose when the claim against the company is barred.

II. UPS v. MITCHELL SHOULD BE APPLIED PROSPECTIVELY ONLY.

Should the Court reject Del Costello's contention that §10(b) provides the appropriate limitation period for his claims against Anchor and Local 557, it will then be necessary to reach the question whether the rule of UPS v. Mitchell should be applied retroactively to bar this action. The complaint was filed in March 1978, over three years before Mitchell was decided, No effort was made to meet the arbitral statute in light of the almost universal application of contract or tort statutes to cases like this one.

The principles governing retroactive

application of civil decisions were formulated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), and reaffirmed last term in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (June 28, 1982). Three considerations are pertinent:

> First, whether the holding in question "decided an issue of first impression whose earlier resolution was not clearly foreshadowed" by earlier cases; second, "whether retrospective operation will further or retard the operation of the holding in question; and third, whether retroactive application "could produce substantial inequitable results" in individual cases. Northern Pipeline, supra, at 2880.[13]

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[13] In Chevron, the Court recognized an alternate consideration to the first element set forth in Northern Pipeline, where the decision overruled "clear past precedent upon which litigants may have relief". Although Del Costello relied on numerous appellate and other decisions which used contract or tort limitation periods, he recognizes, with hindsight provided by UPS v. Mitchell, that most did not involve challenges to arbitrated grievances. Similarly, although plaintiff thought that Hoosier Cardinal had expressly disapproved "excessively short" statutes as sixty days, this was dictum and thus not "clear past precedent."

Examining these factors in turn, it is clear that a retroactive application of UPS v. Mitchell would be improper.

1. The Application of an Arbitral Period Was an Issue of First Impression Whose Resolution Was Not Clearly Foreshadowed.

Although this Court had never considered the possible application of arbitral limitation periods to suits under §301 before Mitchell, it did address the limitations periods under §301 in UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966). There, the Court rejected the employer's argument for the six-month limitations period set forth in §10(b) of the National Labor Relations Act. Instead, the appropriate period for each case was to be "borrowed" from the state limitations period which is applied to the closely analogous causes of action.

Informed by the national labor policy

favoring expeditious resolution of disputes, the Court ruled that the six year period for contracts not in writing was the most closely analogous Indiana limitation period. The Court warned, however, that should the most closely analogous state limitation period be "unusually short or long", citing a New Mexico statute allowing sixty days, then "other questions would be raised ... See Campbell v. Haverhill, 155 U.S. 610, 615 (1895)." Hoosier Cardinal, 383 U.S., at p. 707, n. 9. On the cited page, in turn, the Court had indicated that a state limitation period which failed to give a party a reasonable time to sue would not be borrowed. The reasonable inference was that the Court deemed sixty days to be unusually short and would not countenance its application to an action under §301.

During the following fifteen years between Hoosier Cardinal and Mitchell, most courts

of Appeals had the opportunity to consider the appropriate limitation period for §301/fair representation actions, and almost every one determined that the state tort or contract periods were most closely analogous.[14] Similar results were reached in the district court.[15]

It was not until 1976 that this Court decided that §301/fair representation actions could be filed after a final and binding decision

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[14] DeArroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir., 1970) (tort); Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir., 1970) (contract); Kennedy v. Wheeling Pittsburgh Steel Corp., 81 LRRM 2349 (4th Cir., 1972) (contracts); Sanderson v. Ford Motor Co., 483 F.2d 102 (5th Cir., 1973); Gallagher v. Chrysler Corp., 613 F.2d 167 (6th Cir., 1980) (tort); Butler v. Teamsters Local 823, 514 F. 2d 442 (8th Cir., 1975)(contract). See also Price v. Southern Pacific, 586 F.2d 750 (9th Cir., 1978) (right created by statute).

[15] E.G., Mikelson v. Wisconsin Bridge & Iron Co., 359 F.Supp. 444 (WD/WIS 1973); Grant v. Mulvihill Bros. Motor Serv., 428 F.Supp. 45 (ND/ILL. 1976) (contract); Howard v. Aluminum Workers, 418 F.Supp. 1058 (ED/VA 1976) (tort statute applied to action against union only).

had been made on a grievance prosecuted by the union. Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).[16] Thus, the question of the limitation period applicable to this category of cases has arisen less frequently. Nevertheless, most courts borrowed the same state statutes as for other §301/fair representation actions.[17] Although there were a few district court decisions applying state arbitration periods,[18] it

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[16] Although the limitations issue was not raised in Hines, plaintiffs had sued approximately two years after the adverse decision, long after the Ohio arbitration statute had run.

[17] Mitchell v. United Parcel Service, 624 F.2d 394 (2d Cir., 1980), rev'd, 451 U.S. 56 (1981); Smart v. Ellis Trucking Co., 580 F. 2d 215 (6th Cir., 1978); Warren v. Teamsters, 544 F.2d 334 (8th Cir., 1976); Brooks v. Southwestern Transp.Co., 97 LRRM 2616 (ND/TEX, 1978); DeVries Interstate Motor Freight, 91 LRRM 2764 (ND/O, 1976); Lehto v. Underground Constr. Co., 96 LRRM 2337 (Calif. Ct. App. 1977).

[18] E.g., Barbarino v. Anchor Motor Freight, 421 F.Supp. 1003 (WD/NY, 1976); De Lorto v. UPS, 401 F.Supp. 408 (D/MASS, 1975).

was not until several months after Mitchell was decided in the Court of Appeals that the first and only Court of Appeals decision approving that rule was issued.[19] Thus, although Mitchell involved an issue of first impression in this Court, that decision reversed the weight of lower court authority. Singer v. Flying Tiger Line, 652 F.2d 1349 (9th Circuit., 1981); Kennard v. UPS, 531 F. Supp. 1139 (ED/MICH, 1982).

The district court below ruled to the contrary because it deemed Mitchell not to be a "case ... of first impression in the same sense" as was involved in Chevron Oil. Rather, "Hoosier Cardinal has established some general principles and Mitchell applied them." It believed that decisions must be applied retroactively unless they involve "a clear break with

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[19] Liotta v. National Forge Co., 629 F. 2d 903 (3d Cir., 1980).

the past", and that a well-informed or reasonable belief about the state of the law would not be sufficient. (Petition for Writ of Certiorari, B-23)

This view is not correct. It is true that in Chevron Oil the decision applied prospectively overruled previous decisions by the Fifth Circuit and was, at least in part, decided in the absence of previous decisions by this Court in the same area of the law.[20] However, a question of first impression may be presented even when there are many previous decisions which developed principles which are, for the first time, applied to the particular

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[20] Rodrigue v. Aetna Casualty Co., 395 U.S. 352 (1969), addressed two issues: whether the Lands Act adopted state law principles, and whether it applied to artificial drilling structures on the high seas. Only the former question was decided in the absence of previous decisions by the Court.

issue before the Court. For example, last term in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 50 U.S.L.W. 4892 (June 28, 1982), the Court applied the principles of such cases as United States v. Raddatz, 447 U.S. 667 (198); Crowell v. Benson, 285 U.S. 22 (1932), and Ex Parte Bakelite Corp., 279 U.S. 438 (1929). Similarly, in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), the Court withheld retroactive application of its construction of Government Employees v. Windsor, 353 U.S. 364 (1957), in light of NAACP v. Button, 371 U.S. 415 (1963). Accordingly, the fact that the Court, in Mitchell, applied the principles of Hoosier Cardinal is no reason to deny that it was a case of first impression.

Nor was the District Court correct in requiring more than a "reasonable belief" on Del Costello's part. The first element of the

Chevron Oil test for prospectivity is met unless the resolution of the question was "clearly foreshadowed". 404 U.S., at 106. See also Northern Pipeline, 50 U.S.L.W., at 4902. Indeed, in England v. Louisiana Medical Examiners, prospective application was granted precisely because the plaintiff's views were "not unreasonable". 375 U.S. at 422.

The reasonableness of Del Costello's reliance on a three year period was expressly found by the District Court (Petition for Writ of Certiorari B-23) and the foregoing discussion of the case law supports that finding. But the best indication of Del Costello's reasonableness, the best support for our argument that Mitchell was not "clearly foreshadowed", may be found by reviewing the course of litigation of this action before Mitchell was decided.

The complaint in this case, which was filed on March 16, 1978, revealed on its face that the joint committee had rejected Del Costello's grievance well over thirty days before Local 557 answered on April 10, 1978, but did not raise the defense that the suit was time-barred (JA 34-43), which was probably justified because the Maryland arbitral statute in §3-206(b) of the Courts and Judicial Proceedings Article is expressly inapplicable for labor disputes. Anchor Motor Freight did mention the defense of limitations in its answer dated May 21, 1978. (JA 52, 53) Yet, despite the fact that both defendants filed motions to strike plaintiff's jury demand on May 1 and 3, 1978, neither pursued the limitations issue with a motion to dismiss. (JA iii, iv, v)

For the thirty-two months following

service of the complaint the parties engaged in extensive discovery (900 pages from seven witnesses, over two hundred exhibits, and several sets of interrogatories). Del Costello is not aware exactly how much resources defendants expended on the case, but doubts it is less than the $7,500 he has been required to pay for the costs of the proceedings, exclusive of counsel fees which have not been paid. Yet, despite these substantial expenditures and despite the great sophistication of defendants' counsel, who are labor specialists -- indeed, union counsel teaches labor law at the University of Maryland School of Law -- neither sought to avoid the costs by raising the limitations defense.[21]

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[21] The leading scholarly comments on limitations in these cases did not even allude to the possible application of arbitral statutory periods. Note, Statutes of Limitations

On October 14, 1980, this Court granted certiorari in Mitchell. 449 U.S. 898. One month later both defendants moved for summary judgment. Only then did the possibility of victory on the statute of limitations defense seem sufficient to warrant the effort required to brief it. The District Court denied summary judgment in all respects except the availability of punitive damages. (Petition for Writ of Certiorari B 11-15) It recognized that there was a division of authority on the limitations question, but found the Second Circuit's reasoning in Mitchell "more persuasive". (Petition for Writ of Certiorari B-10)

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21 cont'd:
Governing Fair Representation Actions Against Union When Brought With §301 Action Against Employer, 44 G.W.U.L. Rev. 418 (1976). The following are legal treatises:
B.N.A., The Developing Labor Law -- The Courts, The Boards, The Natl. Labor Relations Act, Cum. Supp. 1971-1975, p. 398, 399, and 1977 Supp., p. 235; Fed. Regulation of Employment Service, Ch. 15, §57 (1978); Gorman, Basic Text on Labor Law, Ch. 31 (1976),p.724, 725.

After Mitchell was decided, defendants renewed their motion and the District Court ruled that this action was time-barred. (Petition for Writ of Certiorari B 16-29)

This Court's discussion of "unusually short" limitation periods, the weight of pre-Mitchell authority (including the pre-Mitchell decision in this case), and the failure of defense counsel to raise the issue before certiorari was granted in Mitchell, all support the District Court's finding that Del Costello's belief that three years were permitted before filing suit was reasonable. Accordingly, the "first impression" clearly foreshadowed element of the Chevron Oil test is satisfied.

2. Retroactive Application of Mitchell Will Not Further Its Operation, But Would Retard the Operation of the National Labor Policy.

The second consideration under Chevron Oil is whether retroactive application of a new rule will further or retard its operation. Of course, in a certain sense any rule will be "furthered" by every application; thus, the question must be whether the underlying policies will be furthered or retarded. Thus, for example, in Chevron Oil the Court noted that the underlying statute construed in Rodrigue was intended by Congress to provide employees with a more effective remedy for personal injuries. Accordingly, even though the Rodrigue decision required application of a short statute of limitations, the Court applied it prospectively in order to effectuate the underlying statutory policy. Here, the statutory policies favoring an arbitral limitation period will not be furthered, and the underlying duty of fair representation will be substantially disserved by retroactive application of Mitchell.

The reason given by the Court for adoption of the arbitral period was that it would encourage the rapid disposition of labor disputes, and in particular would expedite the finality of grievance decisions which interpreted critical terms in the collective bargaining agreement lest they be called into question several years later. UPS v. Mitchell, 451 U.S. 56, 63-64 (1981). Yet, the only employees who will benefit from prospective application are those who filed their actions before April 21, 1981. Accordingly, retroactive application of Mitchell cannot encourage employees to file their actions more quickly. Indeed, Del Costello himself filed only a few months after his grievance was rejected, which certainly comports with the interest in rapid disposition.

Moreover, retroactivity would be a serious

disservice to the national labor policy upon which Mitchell was founded. This Court has repeatedly recognized the strong interest which employees have in protection against unfair treatment by their exclusive representatives. E.g., Hines v. Anchor Motor Freight, 424 U.S. 554 (1976). Indeed, the duty of fair representation and the concomitant right to sue employers when the duty has been violated were developed in order to avoid the serious constitutional questions which would otherwise be raised by exclusive representation. Vaca v. Sipes, 386 U.S. 171 (1967). Mitchell was not intended to foreclose that constitutionally required remedy, but only to require that it be invoked promptly, if at all.

Yet, if Mitchell is applied retroactively, the effect will be totally to destroy any opportunity for resolution of §301 claims on

the part of employees who had no opportunity to be guided by the decision. In these circumstances, the constitutional questions avoided by the Vaca line of cases will be presented. This consequence would surely retard the national labor policy.

3. Retroactive Application Would Be Extremely Unfair.

The final aspect of the Chevron Oil test for prospectivity is equity -- whether retroactive application could produce substantial inequitable results in individual cases. This element is surely present here. If Mitchell is applied to this case, Del Costello will lose any opportunity to contest his discharge from employment, despite the fact that he filed his complaint more than two-and-one-half years before the expiration of the limitation period he believed to be applicable. (JA 158, 159, 164, 165)

This Court's decisions have consistently distinguished between decisions which extinguish a cause of action and those which simply increase or decrease the available remedies, finding that the former warrant prospective treatment. Chevron Oil, for example, not only emphasized the importance of preserving a plaintiff's right to a day in court, but confined its holding to the effects of Rodrigue on the statute of limitations. 404 U.S. at 108-09, and n. 10. Indeed, the Court has carved out an equitable exception to the rule of United States v. Schooner Peggy, 1 Cranch 103 (1801) (decisions are always applied retroactively to cases pending on appeal at the time of decision), for those decisions which extinguish a cause of action. Gulf Offshore Oil Co. v. Mobil Oil Corp., 453 U.S. 475, 486, n. 16 (1981).

Retroactive application would be particularly unjust in light of the practical realities

facing employees who seek redress of violations of their rights by their employers and unions. Unlike these defendants, who normally have specialized counsel on retainer to advise them when litigation becomes necessary, employees tend to have only the most sporadic contact with lawyers, and then usually with respect to non-labor matters. To the extent that they take any legal action with respect to employment, they normally rely on their union's counsel. Moreover, the great majority of attorneys who keep track of developments in the §301/ fair representation area are retained by employers and unions, and thus are not available to advise union members how to enforce their rights.

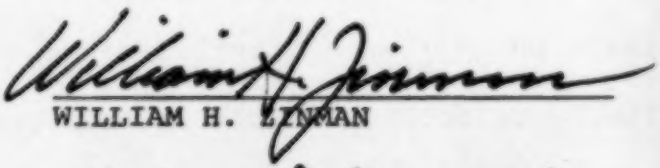
However likely it may be that union and employer counsel could have forecast the result in Mitchell (as they did not in this case), it is beyond belief that a union member would have

(1) concluded that he had enforceable rights; (2) found a lawyer who was willing to represent him; (3) raised enough money to pay the lawyer; (4) had that lawyer do sufficient legal and factual research to warrant litigation and to prepare the complaint; and (5) had that lawyer determine in the course of his or her research that an arbitral limitation would likely be applied -- all in the space of the thirty days allowed by the Maryland statute! In these circumstances, all considerations enumerated in Chevron Oil militate in favor of prospective application of Mitchell, and the decision below should be reversed on that ground.

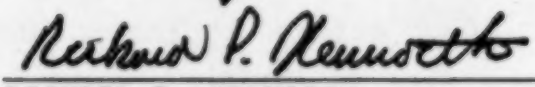
CONCLUSION

For the aforegoing reasons, the Petitioner respectfully requests this Court to reverse the judgment of the Court of Appeals and to direct the Court below to order a trial on the merits in this case.

Respectfully submitted,



WILLIAM H. ZINMAN



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APPENDIX A

STATE STATUTES OF LIMITATIONS GOVERNING ACTIONS TO VACATE ARBITRATION AWARDS

Six states have no time bars in arbitral statutes. Georgia Code 9-9-51, North Dakota Century Code Ann. §32-29-10, Tennessee Code Ann. §29-5-112 and §29-5-113, Virginia Code §8-01-579 -- each county in the State has different time lengths for vacating awards -- West Virginia Code §55-10-3. Vermont (no statute).

Ten states have arbitral statutes that are expressly inapplicable to labor disputes. Alaska State Statutes §.09.043.010, Arkansas State Statutes §34-511, Idaho State Statutes §7-901, Kansas §5-401, Louisiana Ch. 9.4201, Maryland Courts and Judicial Proceedings Article 3-206(b), Michigan General Court Rules 769.9(2), South Carolina §15-47-10 b(2) (1980 edition), Texas Rev. Civ. Stat. Ann. Title 10,

Art. 224, Washington RGW §7.04.010.

Nine states have thirty days or less. Alabama Code 6-6-15 (10 days), Connecticut Gen. Stat. Ann. §52-420 (West) (30 days), Havaii Rev. Stat. §658-11 (10 days), Kentucky Rev. Stat. §417.017 -- Award shall be entered as the judgment of the court at least 10 days after copies of the award are delivered to the parties, unless on exceptions filed, it be set aside by the court --, Maryland Stat. Ann. Courts and Judicial Proceedings §3-224 (30 days), Massachusetts Gen. Laws Ann. Ch. 150c §11 (30 days), Michigan Gen. Court Rules 769 (20 days), Montana Code Ann. Amd. §23 C.12 (1979) -- Award has the effect of judgment after expiration of 5 days from filing award upon application of party and who also files an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least 4 days prior to such

application and as long as no order staying entry has been served --, Oregon Rev. Stat. §33.310 (20 days).

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No. 81-2386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PHILIP DELCOSTELLO,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL.,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

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QUESTIONS PRESENTED FOR REVIEW

1. Did the lower courts correctly apply Maryland's limitations period for the vacation of arbitration awards to the petitioner's § 301 claims against a union?

2. Did the lower courts properly decline to apply the statute of limitations found at 29 U.S.C. § 160(b) to an action brought pursuant to the Labor Management Relations Act, in lieu of Maryland's applicable limitations period for the vacation of arbitration awards?

3. Did the lower courts correctly allow retrospective application of *United Parcel Service, Inc. v. Mitchell* to the facts of this case?

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BRIEF OF RESPONDENT LOCAL 557, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Respondent Local 557, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America submits this brief on the merits.

OPINIONS BELOW

The initial opinion of the district court (Pet. App. B3-B15) is reported in 510 F. Supp. 716. The subsequent opinion of the district court (Pet. App. B16-B29) is reported in 524 F. Supp. 721. The opinion of the court of appeals (Pet. App. B1-B2) is unpublished, but reported in 679 F.2d 879.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was issued on April 19, 1982. The petition for a writ of certiorari was timely filed on June 29, 1982 and a writ of certiorari was granted on November 29, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reprinted as an Appendix to this Brief.

STATEMENT OF THE CASE

Petitioner Philip DelCostello was terminated by Anchor Motor Freight, Inc. (Anchor) in June, 1977 after refusing an order. At the time of his termination, Petitioner was represented by Local 557, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 557). Anchor and Local 557 were parties to the National Master Automobile Transporters Agreement and supplemental agreements (collectively referred to as the Agreement). The Agreement created a structure for the processing of grievances of employees, culminating in final and binding arbitration before the Eastern Conference Automobile Transporters Joint Arbitration Committee (Joint Committee) (JA 211-212).[1]

[1] In the Brief of Teamsters for a Democratic Union (TDU) as *Amicus Curiae* in Support of Petitioner, to which Respondent Local 557 has objected, it is contended that the Agreement's grievance resolution machinery does not constitute the equivalent of arbitration. However, the decisions of identically-structured joint arbitration committees as involved herein have been treated by this Court as arbitration awards. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Humphrey v. Moore*, 375 U.S. 335 (1964); *General Drivers v. Riss & Co.*, 372 U.S. 517 (1963). Also, as noted by TDU, this issue has not been raised by any party to this proceeding (Motion of TDU for Leave to File a Brief as *Amicus Curiae* at 2), and therefore should not be

Local 557 processed a grievance challenging Petitioner's termination. Unable to arrive at an amicable resolution of the issue, Local 557 submitted the matter for resolution by the Joint Committee. An arbitration award upholding Petitioner's termination was issued by the Joint Committee on July 19, 1977.

One month later a Business Agent of Local 557 sent Petitioner a copy of the minutes of the arbitration hearing, and advised Petitioner that they were to be submitted for approval at a scheduled meeting of the Joint Committee. Petitioner was invited to make any corrections he determined to be appropriate, in a manner akin to the presentation to a deponent of a deposition transcript for review (JA 69). Petitioner responded by a letter dated September 14, 1977 asserting dissatisfaction with the grievance process, but making no request for a rehearing of his case (JA 80-84).

Although possessing all information necessary to initiate his lawsuit by August 20, 1977, 524 F. Supp. at 722, Petitioner waited until March 16, 1978 to file an action. His Complaint, which in effect sought to vacate the July, 1977 Joint Committee award, was filed more than seven (7) months after the award became final. The action was brought pursuant to Section 301 of the Labor Management Relations Act [29 U.S.C. § 185(a)].

Respondents Local 557 and Anchor moved for summary judgment on grounds of limitations, *inter alia*. This theory was premised on Maryland's thirty day period for vacation of arbitration awards. Md. R.P. E2 and E4; Md. Cts. & Jud. Proc. Code Ann. § 3-224. The district court rejected these positions, 510 F. Supp. at 720, but noted that the same limitations issue was pending before the Supreme Court.

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considered. *United Parcel Service, Inc. v. Mitchell, supra*, 451 U.S. at 60 n. 2; *Bell v. Wolfish*, 441 U.S. 520, 532 n. 13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960).

When the Court resolved the limitations issue in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), both Respondents urged the district court to reconsider its earlier ruling in light of *Mitchell*. Petitioner's response challenged the retroactive application of *Mitchell*, the application of *Mitchell* to Local 557 and the reasonableness and constitutionality of a thirty day limitations period. Petitioner declined to raise any contention concerning adoption of the limitations period utilized for unfair labor practice charges under the National Labor Relations Act (JA 276) and that issue was not considered by the district court. The district court held that *Mitchell* could be retroactively construed to apply to the case at bar and that Maryland's thirty day period for vacation of an arbitration award was the controlling limitations period governing claims against both Respondents.

Petitioner subsequently appealed the judgment to the Court of Appeals for the Fourth Circuit. On appeal, Petitioner reiterated many of his arguments offered below and added the contention that 29 U.S.C. § 160(b) [Labor Management Relations Act of 1947, as amended, § 10(b)] should govern limitations in fair representation actions arising under 29 U.S.C. § 185. The Fourth Circuit gave no consideration to that issue in affirming the lower court's judgment.

A petition for a writ of certiorari followed, in which Petitioner asked the Court to review three questions. These issues concerned the applicability of the *Mitchell* holding to Local 557, the propriety of the usage of § 10(b) of the National Labor Relations Act, and whether or not *Mitchell* should be afforded retroactive effect. On November 29, 1982, this Court issued a writ of certiorari to review the decision of the Fourth Circuit on all issues. However, the Brief for Petitioner fails to address the first question, except for a reference indicating a limited degree

of support for Local 557's views on this subject (Brief for Petitioner at 34-35).

SUMMARY OF ARGUMENT

I. In *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56 (1981) the Court held that the appropriate limitations period for a breach of contract action by an employee against his employer was the state's statute of limitations for vacation of arbitration awards. That the employee must first prove that his union breached its duty of fair representation before suing his employer for breach of the collective bargaining agreement removes the litigation from normal contract claims and contract statutes of limitation. 451 U.S. at 62. Proof of union wrongdoing should be governed by the same limitations standard when the claim is directed against the union itself.

Application of the relatively short limitation periods of state arbitration laws to claims against unions enhances federal labor policy. Arbitrations may be speedily afforded precedential value in the development of the "common law of the shop".

II. Adoption of the limitations provisions of the National Labor Relations Act would be an unwarranted intrusion into a legislative function. Congressional silence concerning the appropriate limitations period for employee-initiated § 301 actions indicates a desire to rely on state limitations periods. This conclusion is magnified by seventeen years of congressional inaction following *Auto Workers v. Hoosier Corp.,* 383 U.S. 696 (1966) wherein the Court eschewed the same limitations concept espoused by Petitioner.

Usurpation of the legislative function is particularly inappropriate in this case. Petitioner did not argue in favor of a uniform federal statute in the district court. Neither lower court has passed on Petitioner's contention

that limitations were tolled, a conclusion necessary for him to benefit from the prolonged limitations period he seeks.

III. Retroactive application of the holding of *Mitchell* to the instant case is appropriate, pursuant to the three-pronged test established by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). As recognized within the opinion itself, 451 U.S. at 61, *Mitchell* was the logical product of past decisions of the Court. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) established the vacation of an adverse arbitration award to be the prerequisite of an employee's allegation that the collective bargaining agreement was breached. *Auto Workers v. Hoosier Corp., supra*, emphasized the importance of speed and finality in the administration of collective bargaining agreements, as well as reliance upon state law to govern the limitations period for litigation concerning such contracts. The combined impact of *Hines* and *Hoosier* mandated the result achieved in *Mitchell*.

No federal decisions existed at the time of Petitioner's claim which would lead him to reasonably believe he could forestall litigation. However, several district courts had already ruled that post-arbitration § 301 actions by employees were to be governed by the state limitations period for vacation of arbitration awards. Application of *Mitchell* to the instant case would be harmonious with the rule of that case and would produce no inequity.

ARGUMENT

I.

STATE STATUTES OF LIMITATIONS GOVERNING VACATION OF ARBITRATION AWARDS APPLY TO ALL PARTIES IN A POST-ARBITRATION ACTION ALLEGING BREACH OF THE UNION'S DUTY OF FAIR REPRESENTATION AND BREACH OF A COLLECTIVE BARGAINING AGREEMENT.

A. The Rationale Of *Mitchell* Is Dependent Upon Application Of The State Statute Of Limitations For Vacation Of Arbitration Awards To Employee Claims Against Unions

In *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), this Court held that the appropriate period of limitations for an employee's post-arbitration Section 301 action against his employer was contained within the state's statute for vacation of an arbitration award. Respondent Local 557 contends that the reasoning of *Mitchell* directs usage of the same period in an action against the employee's union.

The *Mitchell* employee was terminated on January 13, 1977, but his labor representative challenged that action. The issue of termination was submitted to binding arbitration in the form of a joint committee panel, which upheld the employer on February 16, 1977. Legal action was not initiated until July 20, 1978. 451 U.S. at 58.

The district court granted summary judgment to both employer and union defendants, holding that the action was most closely analogous to a suit to vacate an arbitration award, so that New York's ninety day statute of limitations applied. The court of appeals reversed, holding that the State's six year period for breach of contract was appropriate. 624 F.2d 394 (2d Cir. 1980). The employer alone sought and obtained a writ of certiorari, 449 U.S. 898 (1980), although the union did supply a brief to the Court which supported the employer's position. 451 U.S. at 57.

In reversing the court of appeals, this Court looked to some of its prior case law which interpreted the congressional failure to enact a statute of limitations for § 301 suits as requiring timeliness of actions "to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations". *Auto Workers v. Hoosier*

Corp., 383 U.S. 696, 704-705 (1966). Selection of the appropriate state limitation period was the Court's next task. The parties argued the applicability of the State's limitations statutes utilized by the courts below.

Since the adverse arbitration decision in *Mitchell*, as here, was binding on all parties, the employee was compelled to show that his union had failed to fairly represent him during the arbitration before he could reach the merits of his breach of contract allegation. The necessity of a successful attack upon the union's conduct, unrelated to a breach of contract by the employer, made the lawsuit "more analogous to an action to vacate an arbitration award than to a straight contract action". 451 U.S. at 62 (footnote omitted). Accordingly, the ninety day limitations period for vacating arbitration awards was applied.

Thus, it was the fair representation claim against the union which occasioned utilization of the shorter limitations period. The employer enjoyed the benefit of the same limitations period, since the action against it for breach of contract was derivative to the action against the union.

The conclusion that *Mitchell* was intended to apply to unions is buttressed by the separate opinion of Justice Stevens. He recognized that the Court's language and reasoning would be interpreted to apply to unions. 451 U.S. at 72. The majority opinion did not deny this characterization, nor was the language altered to restrict its precedential impact to employers.

Application of the *Mitchell* standard to the facts underlying this case leads to the conclusion that the action was untimely filed. The Maryland Arbitration Act creates a thirty day limitations period for actions to vacate arbitration awards. Md. Cts. & Jud. Proc. Code Ann. § 3-224. Although the substantive provisions of the State Arbitra-

tion Act are inapplicable to labor disputes, Md. Cts. & Jud. Proc. Code Ann. § 3-206(b), this exclusion is cured by Maryland Rules of Procedure E2 and E4. Those Rules apply the State Arbitration Act's procedural framework to matters outside the Act's ambit. Accordingly, as found by the lower courts, the failure of Petitioner to bring this action within thirty days of receipt of the Joint Committee's decision renders his claims untimely against both Anchor and Local 557.

B. Federal Labor Policy Requires That Unions Be Subjected To No Greater Period Of Limitations Than Are Employers

Perhaps the most common theme running throughout this Court's opinions concerning the timeliness of Section 301 actions is the concern for prompt finality of determinations reached through contractually-established grievance and arbitration procedures. *United Parcel Service, Inc. v. Mitchell, supra,* 451 U.S. at 63; *Auto Workers v. Hoosier Corp., supra,* 383 U.S. at 707. This important policy consideration would be undercut by application to unions of any limitations period greater than that which is used in actions against employers.

An employee's proof that his union breached its duty of fair representation is sufficient to upset what would otherwise be a final and binding arbitration award. *Hines v. Anchor Motor Freight, Inc., supra,* 424 U.S. at 567. So long as a union's handling of an arbitration case is subject to judicial challenge, so too is the finality of the arbitration award. In efforts to resolve future grievances, or as precedent in future arbitrations, an employer could not promptly rely upon its arbitration victory until it became established that the union put forth an adequate effort. During the period of prolonged limitations, unions would be unwilling to concede grievances arising in

instances similar to those in which their past arbitration efforts were unsuccessful for fear of multiplying potential liability in successive lawsuits. The fruit of *Mitchell*, with its promise of speedy development of the "common law of the shop" would be denied to all parties to the arbitration process. *United Steelwkrs. of Am. v. Warrior & Gulf N. Co.*, 363 U.S. 574, 579-582 (1960).

One significant aspect of an extended limitations period for unions arises from the role of the union in defense of the breach of contract aspect of the litigation. Since the employer would not be present to shoulder this portion of the litigation, the union which previously had been advocating the view that the employer's actions were in breach of the contract would suddenly become charged with defense of the employer's position. This conflict in positions would serve to undermine the union's credibility with its membership and the public generally.

C. Petitioner DelCostello Has Abandoned The Issue Of Distinct Limitations Against Local 557

Perhaps the best reason to subject Respondent Local 557 to the same limitations period as governs the claim against Respondent Anchor is the fact that Petitioner DelCostello now agrees that this is the best approach. After raising the issue of a distinct period of limitations as one ground for the granting of a writ of certiorari (Petitioner's Brief for Certiorari at 11-12), Petitioner now supports the concept of a common statute of limitations for employer and union, although he urges the utilization of a longer statute (Brief for Petitioner at 34-35). While Local 557 questions whether a writ of certiorari would have been granted if Petitioner had earlier indicated his happiness with lower court rulings on this issue, it welcomes Petitioner's belated conversion.

II.

ADOPTION OF THE SIX MONTH LIMITATIONS PERIOD OF THE NATIONAL LABOR RELATIONS ACT IS INAPPROPRIATE WHERE STATE LAW OFFERS AN ANALOGOUS LIMITATIONS PERIOD.

In contending that this Court should borrow a statute of limitations from the National Labor Relations Act [29 U.S.C. § 160(b)] Petitioner asks for the end of well-established judicial doctrine on the law of limitations. This radical proposal is particularly inappropriate in light of Petitioner's refusal to raise this argument before the district court.

A. State Statutes Of Limitations Govern The Timeliness Of Federal Causes Of Action Unless Congress Has Specifically Provided Otherwise

Where Congress has created a federal cause of action, but no period of limitation for initiation of litigation, federal courts apply appropriate state limitations periods. *McCluny v. Silliman,* 28 U.S. 676, 678 (1830). This principle has been applied over a broad spectrum of federal causes of action. E.g., *Runyon v. McCrary,* 427 U.S. 160, 179-182 (1976) (Civil Rights Act of 1866); *Auto Workers v. Hoosier Corp., supra,* 383 U.S. at 701-704; *Cope v. Anderson,* 331 U.S. 461, 463 (1947) (National Bank Act); *O'Sullivan v. Felix,* 233 U.S. 318, 322 (1914) (Civil Rights Act of 1871); *Chattanooga Foundry v. Atlanta,* 203 U.S. 390, 397 (1906) (Sherman Act); *Campbell v. City of Haverhill,* 155 U.S. 610 (1895) (Patent Act). The basis for this doctrine is the assumption that congressional silence on the limitations aspect of a federal claim is to be interpreted as a desire to utilize state periods. *Auto Workers v. Hoosier Corp., supra,* 383 U.S. at 703-704. Where Congress objects to state limitation periods, it is capable of amending its original enactment to provide a

uniform limitations period. E.g., 69 Stat. 283, 15 U.S.C. § 15b (1964 ed.) (Clayton Act); 35 U.S.C. § 286 (Patent Act). Cf. *Grigg v. U.S.*, 277 U.S. 582 (1928) (World War Veterans Act, 1924, 38 U.S.C. § 784).

B. Congressional Silence On The Appropriate Limitations Period For A § 301 Action Indicates Satisfaction With Application Of State Limitation Periods

In 1947, Congress enacted legislation which constitutes the center of the instant controversy. It passed a six month period to govern unfair labor practice charges presented to the National Labor Relations Board. 61 Stat. 146, 29 U.S.C. § 160(b). Simultaneously it enacted Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), which contains no limitations period.

The conduct of a labor organization charged with representing employees may be challenged under either law. *Vaca v. Sipes*, 386 U.S. 171 (1967). Congress did not intend to limit employees to the administrative remedy afforded by the National Labor Relations Board. *Id.* at 182-183. Indeed, the distinct procedural provisions growing out of the two enactments constituted one basis for the Court's determination that the National Labor Relations Act did not pre-empt the area of a union's duty of fair representation. *Id.* at 181-182.

Petitioner seeks to blur the alternate remedies available to disgruntled employees by seeking an identical limitations period under each. A previous effort along these lines was rejected by this Court.

In *Auto Workers v. Hoosier Corp., supra*, a union sued an employer under § 301 to collect vacation monies allegedly owed employees pursuant to a collective bargaining agreement. The employer challenged the timeliness of this action under an analogous state law, which the union

contended to be without application. Instead the union sought creation by the Court of a uniform federal limitations period. The Court refused to engage in "so bald a form of judicial innovation". 383 U.S. at 701.

The value of uniformity is strongest where its presence would enhance the functioning of collective bargaining and internal dispute resolution. However, limitations are an issue only where one of these functions has collapsed. Accordingly, the Court concluded that the judicial legislation sought by the union was not warranted, and that state law should be applied. *Id.* 702-703.

Like *Hoosier,* the instant case is also brought under § 301, and makes no reference to the National Labor Relations Act (JA 3). It alleges a breakdown of the contractual dispute resolution process. As in *Hoosier,* Petitioner asks the Court to embark on a course of judicial legislation, thereby usurping a role properly reserved to Congress. The *Hoosier* Court recognized the congressional failure to provide a uniform limitations period as being an insufficient excuse to invent one. *Id.* at 703. Seventeen years after that ruling, Congress remains silent and Petitioner is without a basis to alter the Court's past interpretation of that silence.

C. Application Of The Six Month Limitations Period Of § 10(b) Is Inappropriate In This Case

In an *amicus curiae* brief filed in *Mitchell,* the American Federation of Labor and Congress of Industrial Organizations urged the Court to adopt the six month limitations period of § 10(b) of the National Labor Relations Act in § 301 fair representation cases. The Court refused to apply this theory, noting both that it had not been raised in the case and that the action was commenced outside both the statutory six month limitations period and New York's ninety day period. 451 U.S. at 60 n. 2. Those same shortcomings are present in the instant case.

In replying to the Joint Motion for Reconsideration filed in the district court by Local 557 and Anchor, Petitioner argued, *inter alia*, that Maryland's thirty day limitations period was unconstitutional because it was unreasonably short.[2] Petitioner recognized that *Mitchell* had approved New York's ninety day limitations period, but contended that Maryland's thirty day period offered an insufficient opportunity to prepare a lawsuit challenging a detrimental arbitration ruling. Petitioner asserted that although "it would be presumptuous to expect this Court to promulgate a new national policy establishing six month limitations for all 301 actions, it is quite appropriate for the Plaintiff to assert that the thirty day limitation period is unreasonably short" (JA 276). Since it was not confronted with the § 10(b) issue, the district court gave it no mention in either of its opinions. In affirming, the circuit court made no mention of § 10(b). Where opinions of the district court and circuit court are devoid of any reference to a particular issue, as here, the Court has held that it would not consider it in the first instance. *Ramsey v. Mine Workers,* 401 U.S. 302, 312 (1971).

Even if Petitioner had preserved his § 10(b) contention, it would be unavailing. Petitioner initiated this litigation on March 16, 1978, seven months after he was aware his termination had been upheld in arbitration, and outside the six month period he asks this Court to adopt. Petitioner seeks to avoid the consequences of his delay by arguing that limitations were tolled until December, 1977.

In support of this position, Petitioner distorts the opinion of the district court. The district court did not decide the issue of tolling of limitations, since the action was not filed until Maryland's thirty day period had run. Thus, even assuming Petitioner's tolling argument was

[2] Although it was pressed before the district court, Petitioner has abandoned this constitutional question.

meritorious, the action was untimely filed. 524 F. Supp. at 723. Since Petitioner failed to argue the applicability of § 10(b), the district court was not required to decide whether or not limitations were tolled, and this Court should not be the first tribunal to pass on that question.

III.

THE COURT'S RULING IN *UNITED PARCEL SERVICE, INC. v. MITCHELL* SHOULD NOT BE LIMITED TO PROSPECTIVE APPLICATION.

The question of whether or not to give retroactive application to statements of law by appellate courts has been raging through centuries of English and American jurisprudence. On the one hand is the view that the law is a constant presence merely awaiting discovery and identification by judges. The other philosophy shows a concern for litigants who rely upon the current status of the law in determining legal rights and responsibilities. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) constitutes an effort to blend and balance these competing concerns.

While the *Chevron Oil* case was still pending pre-trial discovery, this Court ruled in *Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352 (1969) that the appropriate statute of limitations of actions arising under the Lands Act should be governed by the analogous state law. *Rodrigue*, like *Chevron Oil*, arose in Louisiana which applied a one year limitations period to such causes of action, as distinguished from a long line of Fifth Circuit decisions which allowed a longer limitations period. The *Chevron Oil* Court composed a three-part test to be utilized in deciding whether retroactive application of its decisions is warranted. These factors are:

1. Whether the newly announced decision establishes a new principle of law either by overruling clear past precedent upon which the litigants have relied or by deciding a question of first impression whose resolution was not foreshadowed;

2. Whether retrospective operation of the doctrine would enhance or hinder the policies of the newly announced rule; and

3. Whether substantial inequitable results would follow if the new ruling were applied retroactively.

404 U.S. at 106-107.

Normally, determinations of this Court are afforded retroactive application. *National Association of Broadcasters v. F.C.C.*, 554 F.2d 1118, 1130 (D.C. Cir. 1976). Lower courts will apply judicial case law as it exists at the time of decision. *Cash v. Califano*, 621 F.2d 626, 628 (4th Cir. 1980); *Baker v. Bell*, 630 F.2d 1046, 1056 (5th Cir. 1980). Thus, all three factors listed in *Chevron* must favor prospective application before a decision will be denied retroactive effect. *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1289 (7th Cir. 1980). In the instant case, none of the *Chevron* factors favor such a limitation on the applicability of *Mitchell*.

A. *Mitchell* Did Not Establish A New Principle Of Law

The reasoning of *Mitchell* flowed from this Court's earlier rulings concerning deference to state limitation standards in the context of challenges to final arbitration awards. The Court indicated that its ruling was bottomed on the holdings of *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) and *Auto Workers v. Hoosier Corp.*, 383 U.S. 696 (1966).

Reversing the decision of the Second Circuit Court of Appeals, the Court noted that *Hines* "strongly supports borrowing the limitations period for actions to vacate arbitration awards". 451 U.S. at 61. That conclusion was based on the prerequisite that the disgruntled employee prove union wrongdoing in order to overturn the otherwise

final arbitration award. Only when that award was vacated could the employee level his breach of contract allegation against the employer. 451 U.S. at 62-63 n. 4.

The logic of *Hines* was as available to Petitioner as it was to the *Mitchell* Court. Where an apparent foreshadowing of a subsequent ruling is present, retroactive interpretation of the later decision is appropriate. Indeed, the Court has held that even in the presence of scattered authority contrary to its eventual ruling, retroactive application of the subsequent decision is appropriate. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), an action was brought under § 2 of the Sherman Act concerning the alleged monopolization of the shoe machine industry. The Third Circuit Court of Appeals held in that case that damages could commence only from the date of the Supreme Court's ruling in *American Tobacco Co. v. U.S.*, 328 U.S. 781 (1946) which, according to the circuit court, had changed the standard of proof required in such Sherman Act cases. In *American Tobacco,* this Court had indicated that monopoly power alone, even absent proof of predatory practices, could constitute a violation of the Sherman Act. In reversing the Third Circuit in *Hanover Shoe,* this Court gave retroactive effect to the rule it enunciated in *American Tobacco.* The Court pointed out that the *American Tobacco* opinion had not "indicated that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by those courts". 392 U.S. at 496. Where, as here and unlike *Chevron,* the Court did not indicate that it felt it was adopting a radically new interpretation of existing authority, retroactive application is appropriate. 392 U.S. at 496-497.

Thus, where the status of the law is murky, litigating parties rely upon their interpretations of lower court

decisions at their own peril. However, a review of the status of fair representation litigation at the time Petitioner's alleged cause of action arose not only reveals no murkiness, but instead shows that the law was not at all supportive of his position concerning limitations. The ruling of the Court in *Mitchell* overturned no federal precedent in effect at the time by which the Petitioner should have initiated this action.

After extreme reliance in the district court upon cases not involving arbitration proceedings (JA 235-246), Petitioner appears to have come to the realization that this dependence has been misplaced (Brief for Petitioner at 36 n. 13). Notwithstanding this concession, Petitioner has cited numerous opinions which fail to establish that *Mitchell* overruled clear past precedent. Much of the authority relied upon by the Petitioner does not involve employee dissatisfaction with arbitration awards, but rather involves grievances which the union chose not to process fully.[3] Other authority relied upon by Petitioner involves decisions in which no party urged the applicability of a state limitations statute governing the vacation of arbitration awards.[4]

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[3] *Gallagher v. Chrysler Corp.*, 613 F.2d 167 (6th Cir. 1980); *Price v. Southern Pacific Transportation Co.*, 586 F.2d 750 (9th Cir. 1978); *Sanderson v. Ford Motor Co.*, 483 F.2d 102 (5th Cir. 1973); *Kennedy v. Wheeling-Pittsburgh Steel Corp.*, 81 LRRM 2349 (4th Cir. 1972); *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970); *DeArroyo v. Sindicato de Trabajadores Packing House*, 425 F.2d 281 (1st Cir. 1970); *Grant v. Mulvihill Brothers Motor Service, Inc.*, 428 F. Supp. 45 (N.D. Ill. 1976); *Howard v. Aluminum Wkrs. Intern. U.*, 418 F. Supp. 1058 (E.D. Va. 1976), aff'd 589 F.2d 771 (4th Cir. 1978); *Mikelson v. Wisconsin Bridge and Iron Co.*, 359 F. Supp. 444 (W.D. Wis. 1973).

[4] *Warren v. I.B.T.*, 544 F.2d 334 (8th Cir. 1976); *Butler v. Local U. 823 International Brotherhood of Teamsters*, 514 F.2d 442 (8th Cir. 1975), *cert. denied* 423 U.S. 924 (1976); *Brooks v. Southwestern Transportation Co.*, 97 LRRM 2616 (N.D. Tex. 1978); *DeVries v. Motor Freight System*, 91 LRRM 2764 (N.D. Ohio 1976).

By limiting review to those cases which involve arbitration decisions in which some party argued that the applicable limitations period is that used in state law for vacation of an arbitration award, the Petitioner's authority is reduced to two cases only. His current reliance on those cases is unwarranted.

Smart v. Ellis Trucking Co., Inc., 409 F. Supp. 129 (E.D. Mich. 1976) was an action initiated after an adverse arbitration ruling. The employer argued that the portion of the claim involving breach of contract was barred by the Michigan twenty day period for vacation of arbitration awards, and additionally, that the arbitration award was final. The district court refused to review the merits of the arbitration award, thereby avoiding the issue of limitations. On appeal, the Sixth Circuit applied (retroactively) the newly recited doctrine of *Hines v. Anchor Motor Freight, Inc., supra,* to overturn the district court's basis of decision. 580 F.2d 215 (6th Cir. 1978). The circuit court then, for the first time in the proceeding, determined that the twenty day limitation period was inappropriate. The Sixth Circuit's decision was issued on July 25, 1978, over one year after the origin of Petitioner's claim and four months after the initiation of this action. Petitioner could not have used *Smart,* a decision rendered after he filed this case, as a basis for forbearance from suing.

Lehto v. Underground Construction Co., 69 Cal. App. 3d 933 (1977), like *Smart,* does not appear to be supportive of retroactive application of *Mitchell* at first glance. That state court decision refused to apply California's one hundred day period for review of arbitration awards, but rather used the four year period for contract decisions. Issued a scant few months before Petitioner's alleged cause of action arose, it is in direct conflict with two earlier rulings of California's federal district courts, *Elrod v. Western Conference of Teamsters,* 77 LRRM 2619 (C.D.

Cal. 1971) and *Howerton v. J. Christenson Co.*, 76 LRRM 2937 (N.D. Cal. 1971). Both federal cases require an employee seeking relief against his employer or union after an unsuccessful arbitration effort to initiate that action within one hundred days. Identical holdings were rendered by various district courts which considered the question in years prior to the termination of Petitioner. *Barbarino v. Anchor Motor Freight, Inc.*, 421 F. Supp. 1003 (W.D. N.Y. 1976); *DeLorto v. United Parcel Service, Inc.*, 401 F. Supp. 408 (D. Mass. 1975); *Hill v. Aro Corp.*, 275 F. Supp. 482 (N.D. Ohio 1967). Cf. *United Mine Workers of Am. v. Jones & Laughlin Steel Corp.*, 378 F. Supp. 1206 (W.D. Pa. 1974); *Hana Heating & AC Co., Inc. v. Sheet Metal Workers Local Union 38*, 378 F. Supp. 1001 (S.D. N.Y. 1974); *International Bro. of Teamsters, Local 249 v. Motor Freight Express, Inc.*, 356 F. Supp. 724 (W.D. Pa. 1973).

It was neither the intent nor effect of this Court to overrule or radically change the status of the law with *Mitchell*. As early as 1967 federal courts had been applying similar limitations periods in order to conform with the intertwined national labor policies of encouraging the rapid resolution of labor disputes and ensuring the finality of grievance arbitration awards. At the time when Petitioner's claims could have been timely filed, no federal court decision existed to support alleged reliance on some now-invalid legal principle when he deferred the commencement of his action. Reliance, in order to make a court resort to prospective relief, must be reasonable. *Bronze Shields, Inc. v. N.J. Dept. of Civil Serv.*, 667 F.2d 1074, 1085 (3d Cir. 1981). Where, as here, there is no reversal of a prior position, no novel issue, and no clearly declared judicial doctrine in the circuit which was fundamentally altered by the new decision, reliance is unjustified. *Lawson v. Local 100*, ___ F.2d ___, No. 81-3722 (6th Cir. Jan. 17, 1983) (appended to Brief of

Respondent Anchor Motor Freight, Inc.); *Service Emp. Intern. Union, Etc. v. Office Ctr., Etc.*, 670 F.2d 404 (3d Cir. 1982).

B. Retroactive Application Of The Limitations Policy Established By *Mitchell* Will Promote The Policies Enunciated Therein

By their very operation, statutes of limitation work to speed up judicial processes by compelling litigants to promptly state their claims at penalty of forfeiture. This value is enhanced when applied to the labor relations context.

"[R]elatively rapid disposition of labor disputes" is a touchstone of a federal labor policy which is bottomed on arbitration. *Hoosier Corp., supra,* 383 U.S. at 707. The *Mitchell* opinion placed a high value on the speed of ultimate grievance resolution. Of less concern was the right of an employee to tardily seek relitigation of his grievance.

The rule to be applied from *Mitchell* and the policy it promotes are identical, compelling retrospective application in this case. The congressionally described need for predictability in labor relations mandates the rejection of claims raised by those employees which would retard the grievance procedure. *Mauget v. Kaiser Engineers, Inc.*, 546 F. Supp. 486 (S.D. Ohio 1982); *Lewis v. Harbison-Walker Refractories*, 542 F. Supp. 1381 (N.D. Ind. 1982); *Kikos v. International Brotherhood of Teamsters*, 526 F. Supp. 110 (E.D. Mich. 1981).

Retroactive application of *Mitchell* in this case enhances the policy considerations enunciated by the Court. Accordingly, the denial of Petitioner's request for an exemption from retroactive application should now be affirmed.

C. Retroactive Application Of *Mitchell* Will Not Produce Substantial Inequitable Results

Mere deprivation of an individual's remedy does not bar retroactive application of a subsequent rule of law. In analogous situations courts have often decided to apply new case law retroactively, despite the fatal impact such action may have on an individual claim.

Holzsager v. Valley Hospital, 646 F.2d 792 (2d Cir. 1981) reinforces this view of the equities involved in retroactive application of a judicial ruling which limits remedies. It concerned a medical malpractice action filed in a New York court against a New Jersey health care institution for alleged wrongdoings committed on its premises. The initiation of the suit was postponed for twenty months while the surviving spouse redomiciled from New Jersey to New York. The *Holzsager* plaintiff bottomed her theory of New York jurisdiction on an attachment of an insurance policy issued to the hospital from a New York insurer. Such action was permitted under *Seider v. Roth*, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966). While the malpractice action was pending, this Court issued its opinion in *Rush v. Savchuk*, 444 U.S. 320 (1980), which held that personal jurisdiction could not be obtained over a non-resident defendant through *quasi-in-rem* attachment of an insurance policy. By the time the matter of retroactive application of *Rush* was decided, New Jersey's two year malpractice limitation had expired. Nevertheless, the appellate court held that application of the standards of *Chevron Oil Co. v. Huson, supra*, warranted retroactive application of *Rush*. This conclusion was reached despite the finding that the *Holzsager* plaintiff met the first *Chevron* criterion, that of overruling clear past precedent. 646 F.2d at 792. The claim failed on the second and third points. No substantial inequity was determined, even though the claim would be defeated on limitations,

because the Supreme Court had imposed the same penalty on the *Rush* plaintiff. 646 F.2d at 797 n. 3. Since the Court "is well aware of how to avoid the effects of applying one of its rulings retroactively", its refusal to do so gave adequate guidance to the *Holzsager* court.[5] *See also Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064, 1073 (2d Cir. 1977); *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

Since the development of a distinct rule on limitations for litigants dissatisfied with an arbitration rule was foreseeable and consonant with the scattered decisions which had addressed the question, the equities favor retroactive operation of the Court's *Mitchell* decision.

[5] Indeed the Court has recently given directions that a decision should be afforded only prospective application. *Northern Pipeline Const. v. Marathon Pipe Line Co.*, ___ U.S. ___, 102 S. Ct. 2858, 2880 (1982). No such action was taken in *Mitchell*, and that decision operated retroactively.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 160(b):

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934.

29 U.S.C. § 185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Maryland Courts & Judicial Proceedings § 3-224(a):

> *Petition.* — (1) Except as provided in paragraph (2), a petition to vacate the award shall be filed within 30 days after delivery of a copy of the award to the petitioner.
>
> (2) If a petition alleges corruption, fraud, or other undue means it shall be filed within 30 days after the grounds become known or should have been known to the petitioner.

Maryland Rules of Procedure E2:

> After a final award has been made in writing in an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, court proceedings may be had to confirm, vacate, modify, correct, or enter judgment on the award. In any such case, the provisions of the Maryland Uniform Arbitration Act concerning such proceedings shall be applicable.

Maryland Rules of Procedure E4:

> The procedure for application to a court otherwise than as provided in Rule E2 of this Subtitle for any relief in connection with an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, shall be as nearly as practicable the same as that provided for such an application in arbitration to which said act applies. This Rule affects only the procedure in such proceedings and does not establish a right to have any question determined by court.

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No. 81-2386

In the Supreme Court of the United States

October Term, 1982

PHILIP DEL COSTELLO,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT ANCHOR MOTOR FREIGHT, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Did the lower courts properly apply the Maryland statute of limitations for actions to vacate arbitration awards to litigation instituted pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185?
2. Did the lower courts correctly allow retrospective application of *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), to the facts of this case in favor of both the employer and the union?

PARTIES IN THE COURT OF APPEALS

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit were Philip Del Costello (petitioner in this Court), Anchor Motor Freight, Inc.[1] (respondent in this Court) and Freight Drivers and Helpers, Local 557 (respondent in this Court). International Brotherhood of Teamsters was not a party in the court of appeals.

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[1]Anchor Motor Freight, Inc. is a subsidiary of Leaseway Transportation Corp.

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No. 81-2386

In the Supreme Court of the United States

October Term, 1982

PHILIP DEL COSTELLO,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT ANCHOR MOTOR FREIGHT, INC.

Respondent Anchor Motor Freight, Inc. hereby submits its brief on the merits in the above matter.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland reported at 524 F.Supp. 721 (D. Md. 1981) is the decision concerning which the writ of certiorari was granted. This opinion substantially revised the earlier decision of the district court found at 510 F.Supp. 716 (D. Md. 1981). The opinion of the United States Court of Appeals for the Fourth Circuit affirming 524 F.Supp. 721 (D. Md. 1981) is unpublished but reported at 679 F.2d 879 (4th Cir. 1982).

STATUTES INVOLVED

Rules of Decision Act, as amended, 28 U.S.C. § 1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

National Labor Relations Act § 10(b), 29 U.S.C. § 160(b)

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing

or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Labor-Management Relations Act § 301(a), 29 U.S.C. § 185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Md. Cts. & Jud. Proc. Code Ann. § 3-224

(a) *Petition.* – (1) Except as provided in paragraph (2), a petition to vacate the award shall be filed within 30 days after delivery of a copy of the award to the petitioner.

(2) If a petition alleges corruption, fraud, or other undue means it shall be filed within 30 days after the grounds become known or should have been known to the petitioner.

(b) *Grounds.* – The court shall vacate an award if:

(1) An award was procured by corruption, fraud, or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral, corruption in any arbitrator, or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 3-213, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement as described in § 3-206, the issue was not adversely determined in proceedings under § 3-208, and the party did not participate in the arbitration hearing without raising the objection.

(c) *When award not to be vacated.* – The court shall not vacate the award or refuse to confirm the award on the ground that a court of law or equity could not or would not grant the same relief.

Md. R. P. E2

After final award has been made in writing in an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, court proceedings may be had to confirm, vacate, modify, correct, or enter judgment on the award. In any such case, the provisions of the Maryland Uniform Arbitration Act concerning such proceedings shall be applicable.

Md. R. P. E4

The procedure for application to a court otherwise than as provided in Rule E2 of this Subtitle for any relief in connection with an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, shall be as nearly as practicable the same as that provided for such an application in arbitration to which said act applies. This Rule

affects only the procedure in such proceedings and does not establish a right to have any question determined by court.

COUNTERSTATEMENT OF THE CASE

On March 16, 1978, the petitioner brought an action pursuant to § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185,[2] in the United States District Court for the District of Maryland, seeking essentially the same relief that had been denied to him in a grievance arbitration proceeding. This action was filed more than seven months after the adverse arbitration award was issued, at a time when judicial determinations within Maryland and the Fourth Circuit provided no authoritative definition of the amount of time a party could defer filing a timely action. For over a decade federal courts in numerous other jurisdictions had been applying state statutes of limitations for actions to vacate arbitration awards to cases such as the petitioner's. However, the petitioner chose to ignore Maryland's limitations period for arbitration vacation actions and to delay the commencement of litigation.

After considering these facts in conjunction with the Supreme Court's decision in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), the district court granted summary judgment in favor of the respondents, holding that the petitioner's action was time-barred. The court concluded that Maryland's statute of limitations for actions to vacate arbitration awards was applicable to § 301 claims against employers and unions, in accordance with the view expressed by the majority of the Justices in *Mitchell*, and that it was appropriate to apply this state limitations

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[2]The petitioner's complaint before the district court also alleged jurisdiction under 29 U.S.C. §§ 301 and 411. (J.A. 3.)

period to a case filed prior to *Mitchell's* issuance. The court of appeals summarily affirmed the decision of the district court, based on the reasoning found in Judge Jones' October, 1981 opinion. By so doing, the lower courts kept intact the chain of cases starting before *Campbell v. Haverhill,* 155 U.S. 610 (1895) and continuing through *International Union, United Auto Wkrs. v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966), and *Mitchell,* which have affirmed the validity of the Rules of Decision Act, 28 U.S.C. § 1652, by applying state statutes of limitations to federal causes of action where no limitations period was expressly provided by Congress.

Factual Background

Respondent Anchor Motor Freight, Inc. (Anchor) is a corporation duly organized pursuant to the laws of the State of Delaware and licensed to do business in the State of Maryland. Anchor is engaged in the business of transporting new automobiles throughout this country and in Canada. (J.A. 7-8.) Petitioner Philip Del Costello was for a time employed by Anchor at its Baltimore, Maryland facility as a driver, hauling cars. (J.A. 5, 7.) Respondent Freight Drivers and Helpers, Local 557 (Local 557) is a labor organization affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. At all times relevant to this action, Del Costello was a member of Local 557, which served as his exclusive bargaining agent at Anchor.

The terms and conditions of Del Costello's employment with Anchor were detailed in the National Master Automobile Transporters Agreement and supplemental agreements (the Agreement). This document also established readily available procedures for the resolution of labor disputes. (J.A. 201.)

On June 27, 1977 Del Costello was assigned to drive a tractor-trailer loaded with new cars from the Baltimore terminal to Canada. (J.A. 13.) Even after some requested repairs were made and his superiors assured him that the equipment was safe, Del Costello refused to drive the rig claiming that it was still unsafe.[3] Anchor dispatched the vehicle without further repairs to another driver who examined the equipment, found no hazards and safely made the designated trip.

Del Costello's refusal to work was construed by Anchor as a voluntary quit. (J.A. 172.) In contrast, Del Costello viewed his severance from employment as a discharge and explained the events of June 27, 1977 to the Local 557 Business Agent, Arthur Morningstar, Jr., from that perspective when he spoke to the union representative

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[3]In his brief on the merits, the petitioner alleges that his conduct would now be protected by section 405(a) of the Truck Safety Act of 1982, a proposed statutory provision that has not yet been enacted into law. This frivolous assertion was never made before either the district or the circuit court. It is precisely this kind of irrelevant, immaterial and frankly scandalous matter that Rule 34.6 of the Rules of the Supreme Court of the United States is designed to prevent and strike. Moreover, the fallacy of the petitioner's premise is underscored by the fact that the same equipment with which he refused to work was inspected by another driver, found free of defects and taken on its intended route without additional repairs or mishaps. Even assuming that the petitioner had requested that he be given different equipment, the company was under no duty to provide him with another tractor-trailer or a different trip under these circumstances.

that evening.[4] When informal attempts by Local 557 to gain Del Costello's reinstatement proved fruitless, formal grievance proceedings were initiated by the union. (J.A. 18-19.)

In mid-July, 1977, a hearing was held on Del Costello's grievance before the Eastern Joint Conference Automobile Transporters Joint Committee (Joint Committee). (J.A. 19.) Del Costello appeared and testified at the hearing, along with Business Agent Morningstar, who also presented photographic evidence in support of the grievant's position. (J.A. 19, 76-77.) At the close of the hearing Del Costello was asked if he had been able to submit through his Business Agent all relevant evidence on his behalf. Del Costello responded: "I have nothing else to add." When then asked whether he felt that he had been properly represented he simply replied "[y]es." (J.A. 78.)

The Joint Committee denied Del Costello's grievance and held that the plaintiff's refusal to follow his superior's instructions constituted a voluntary quit. (J.A. 79.) Del Costello received a copy of the adverse award "several days" after it was rendered. *Delcostello v. International Broth. of Teamsters, etc.*, 524 F.Supp. 721, 722 (D. Md. 1981). Article 7, Section 6 of the Agreement provides in

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[4]The petitioner has repeatedly informed this Court of an unfair labor practice charge that he allegedly filed with the National Labor Relations Board (NLRB) against Anchor in connection with his severance from employment. (Petition at 7; Brief for Petitioner at 6.) However, it must be noted that neither the existence of an NLRB charge nor the NLRB's alleged deferral were ever mentioned in any of the proceedings before the lower courts. Nothing in the record below indicates that a charge was filed or that the NLRB deferred consideration of it. Additionally, there is nothing in the record below to suggest that either of these newly alleged events has any relevance to Del Costello's legal arguments. Consequently, the petitioner's comments concerning such a charge are not properly before this Court and should be stricken pursuant to Rule 34.6 of the Rules of the Supreme Court of the United States.

pertinent part that "[a] decision by a majority of a Panel of any of the Committees shall be final and binding on all parties, including the employee and/or employees affected."[5] (J.A. 211-12.)

On or about August 19, 1977, Local 557's Business Agent sent Del Costello a copy of the minutes of his grievance. (J.A. 69). The Business Agent informed him in an accompanying letter that these minutes were to be approved at a scheduled meeting of the Joint Committee. By sending him the minutes, the Business Agent gave Del Costello an opportunity to review and approve the minutes himself before the Joint Committee meeting in mid-September. The process to be followed then was much the same as when copies of corporate minutes containing a corporate resolution are distributed to members of a board of directors. This routine practice allows those who participated in the meeting at which the resolution was passed to ascertain that the minutes accurately reflect what took place. It does not empower the participants to add information that was not presented at the meeting or to alter the effect of the corporate resolution. Del Costello, like a participant in a board meeting, was given an opportunity to verify the accuracy of the Joint Committee's minutes. Mr. Morningstar's letter did not authorize Del Costello to present additional evidence, change his prior testimony or attempt to alter the decision of the Joint Committee. Nowhere in the Business Agent's letter was it stated that either Del Costello's response or the September Joint Committee meeting might be used as a forum for the re-

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[5]In his complaint the petitioner conceded that "the decision by a majority of the panel . . . was and is final, binding and conclusive upon the Union, the Company and the Plaintiff, with no right of further appeal except in cases of a deadlock." (J.A. 23, ¶ 22.) The panel considering Del Costello's grievance did not deadlock. (J.A. 79.) Therefore, according to Del Costello's understanding of the Agreement, the panel's decision was final and unappealable.

hashing of Del Costello's grievance or for the airing of his dissatisfaction with the handling and result of his grievance. Nowhere was it suggested that the decision underlying those minutes was less than final and binding.

Del Costello did not contest either the accuracy of the minutes or the finality of the Joint Committee decision in his response. Instead, in a letter dated September 14, 1977 (J.A. 80.), he set out the reasons for his dissatisfaction with the contractual grievance process. This was not a formal request for a rehearing of his grievance; nowhere in the letter was a rehearing requested. To the contrary, Del Costello asserted in his letter that even if the Joint Committee had heard all of the relevant evidence, it would have been incompetent to understand it. (J.A. 84.)

Proceedings Below

The petitioner had knowledge of all the facts on which he was to base his lawsuit by August 20, 1977, at the latest. *Id.* at 722. Nevertheless, he waited until March 16, 1978 to file an action in the Federal District Court for Maryland, alleging that his employment had been wrongfully terminated by Anchor and that Local 557 had breached its duty to represent him fairly in the ensuing grievance proceedings.[6] This action, which in effect seeks to vacate the July, 1977 Joint Committee award in order to obtain the relief demanded in the complaint, was filed over seven months after the final and binding grievance award was issued.

Anchor has consistently maintained that the petitioner's claims are time barred.[7] In response to Del Costello's

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[6]The International Brotherhood of Teamsters (International) was also named as a defendant in the petitioner's complaint. The allegations concerning the International are not material to the proceedings in this Court.

[7]The issue of waiver of the statute of limitations defense was neither raised by the petitioner nor considered by the court at any point in the district court proceedings.

original complaint, Anchor specifically asserted that the prosecution of the plaintiff's litigation was barred by the application of the appropriate statute of limitations. After discovery was completed,[8] the respondents filed separate motions for summary judgment.[9] In each motion, it was asserted that Del Costello's claims were barred by the statute of limitations. Specifically, Anchor and Local 557 maintained that the application of a thirty-day statute of limitations derived from Maryland's limitations period for the filing of actions to vacate arbitration awards, Md. Cts. & Jud. Proc. Code Ann. § 3-224, applied in conjunction with Rule E2 or E4 of the Maryland Rules of Procedure, precluded the district court from considering the merits of the plaintiff's claims.

At first, in reliance on the recent decision of the Court of Appeals for the Second Circuit in *Mitchell v. United Parcel Service, Inc.*, 624 F.2d 394 (2d Cir. 1980), the Maryland district court declined to grant the respondents' motions for summary judgment.[10] However, following the reversal of the Second Circuit decision by this Court and upon review of the respondents' joint motion for re-

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[8]During a status conference held before the district court during the early stages of this litigation it was agreed by the parties and established by the court that no motions for summary judgment would be filed until after discovery was completed. This was done in order to prevent piecemeal litigation of the issues.

[9]The International, which is no longer a party to this action, submitted a separate motion for summary judgment urging the dismissal of all claims against it on different grounds. This motion was granted.

[10]*Delcostello v. Intern. Broth. of Teamsters*, 510 F.Supp. 716 (D. Md. 1981).

consideration[11] the district court recognized the propriety of applying the principles explained by the Supreme Court in *Mitchell* to the case at hand and granted judgment in favor of the respondents.[12] Petitioner filed a timely notice of appeal from this second Order to the Court of Appeals for the Fourth Circuit.[13] The court considered the briefs

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[11]In his opposition to the joint motion, Del Costello consistently maintained that the state statute of limitations to be applied, if any, was the Maryland statute of limitations for actions to vacate arbitration awards. (J.A. 264.) Although he now urges the Court to apply a tort limitations period, if a state statute of limitations is applied in this case, this proposal was not proferred either in response to the respondents' joint motion or on appeal to the Fourth Circuit. Newly raised at this juncture, this argument is not properly before the Court and should be stricken. The petitioner cannot be allowed to continually add new allegations of facts and legal theories at each successively higher stage of judicial review. Just as it would have been improper for the court of appeals to decide the § 10(b) issue first raised by Del Costello in the Fourth Circuit, *see Delcostello v. International Broth. of Teamsters, etc.*, 679 F.2d 879 (4th Cir. 1982); (*see also* J.A. 220-281, 282-290), so too would it be inappropriate for this Court to consider any of the several facts and legal arguments that were not first presented to the district court.

[12]*Delcostello v. International Broth. of Teamsters, etc.*, 524 F.Supp. 721 (D. Md. 1981). Contrary to Del Costello's assertions, the district court did not "conclude" that Anchor and Local 557 were estopped from claiming that the statute of limitations began to run before December, 1977. The court stated that "[e]ven assuming that limitations did not begin to run until . . . late December, 1977" the action was not timely filed. *Id.* at 723, 725. The court did not decide the issue of estoppel because it deemed the resolution of that issue unnecessary.

[13]No appeal was taken concerning the granting of summary judgment in favor of the International. In addition, the petitioner's appeal did not question the dismissal of his claims filed pursuant to 29 U.S.C. §§ 301 and 411.

and oral arguments of petitioner and respondents. In an unpublished per curiam opinion, the appellate court affirmed the decision of the district court.[14] It is Anchor's position that, in the context of the facts set forth in this brief, the actions of the lower courts were just and correct.

SUMMARY OF ARGUMENT

The lower courts correctly applied Maryland's thirty-day limitations period for actions to vacate arbitration awards to Del Costello's action pursuant to § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 against Anchor Motor Freight, Inc. and Local 557, International Brotherhood of Teamsters. The Rules of Decision Act, 28 U.S.C. § 1652 commands the judiciary to look first at state statutes of limitations when the courts must borrow a limitations period to fill the void left by congressional silence. Only when the utilization of the local limitations period would frustrate federal policy or interfere with federal rights may the courts look to federal law or their own concepts of equity to fashion a new, national limitations provision. *Campbell v. Haverhill*, 155 U.S. 610 (1895).

Mitchell holds that in a § 301 case such as the one at bar, filed after an adverse arbitration award, courts must apply the limitations period for actions to vacate arbitration awards applicable under the law of the forum state. The application of this arbitration statute to Del Costello's claims does not frustrate national labor policy and does not interfere with the petitioner's rights under this or any other federal labor law. Moreover, there is no significant need for nationwide uniformity of statutes of limitations in § 301 cases. Consequently, the application of the state statute of limitations indicated by *Mitchell* is consonant with the guidelines of the Rules of Decisions Act as well as extensive judicial precedent. Under these circumstances,

[14] 679 F.2d 879 (4th Cir. 1982).

judicial legislation of a uniform limitations period from § 10(b) of the National Labor Relations Act is inappropriate and unwarranted.

It is just and equitable for this Court to affirm the retroactive application of *Mitchell* to Del Costello's claims. *Mitchell* followed the decisions of several lower courts that had applied state statutes of limitations for actions to vacate arbitration awards to § 301 cases, when the substance of those proceedings involved disputes that had already been subjected to arbitration pursuant to a collective bargaining agreement. *Mitchell* did not reverse any decision of the United States Court of Appeals for the Fourth Circuit or the District Court for the District of Maryland that was in effect at the time Del Costello filed his action. To the contrary, *Mitchell* was clearly foreshadowed by the case law of that period. Accordingly, Del Costello failed to rely on existing law in his decision to defer filing his action.

Retroactive application of *Mitchell* will enhance industrial stability and promote the prompt resolution of labor disputes. It is contrary to national labor policy to allow an employee dissatisfied with the final and binding result of an arbitration award a prolonged period of time during which he may defer filing his action. At the same time, retroactive application will work no substantial injustice, even though this particular employee may lose access to an additional remedy.

The courts below considered these facts in accordance with the guidelines set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 91 (1971). They concluded that *Mitchell* should be retroactively applied and that Del Costello's claims against Anchor and Local 557 should be dismissed. It is respondent Anchor Motor Freight, Inc.'s position that the decisions of these courts are correct and must be affirmed.

ARGUMENT

I.

THE LOWER COURTS CORRECTLY APPLIED MARYLAND'S LIMITATIONS PERIOD FOR THE VACATION OF ARBITRATION AWARDS TO DEL COSTELLO'S § 301 CLAIMS

The application of Maryland's local statute of limitations for actions to vacate arbitration awards to a § 301 action filed by an employee against his employer and union is consistent with federal law and judicial precedents and best promotes the national policies underlying § 301 of the Labor-Management Relations Act. The application of a state statute of limitations to a federal cause of action when Congress has failed to specify a limitations period is a practice compelled by statute and followed for nearly a century. Contrary to the petitioner's suggestion, federal courts have been borrowing state limitations periods in federal actions for several years in situations substantially identical to the one present here. *E.g., International Union, U.A.W. v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

The Court in *Hoosier* held that since Congress had not enacted a statute of limitations for § 301 actions, their timeliness "is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *Id.* at 704-705. The Court concluded that it could not infer from Congress' silence on the subject that the federal legislature declined to act "in the expectation that the courts would invent [a limitations period]." *Id* at 703. *Hoosier* was consistent with the state of the law at the time of its decision as well as the Rules of Decision Act, 28 U.S.C. § 1652. Its holding is directly applicable to the case now before the Court. Nothing in the case at bar compels the reaching of a different result or the fabrication of a new statute of limitations. No developments in

the law during the years following *Hoosier* supports the reversal of that ruling or the application of a limitations period other than Maryland's arbitration statute.

A. The Rules of Decision Act Compels the Application of State Statutes of Limitations to Federal Actions When Congress Has Elected Not to Enact a National Limitations Period.

The decision of the United States Court of Appeals for the Fourth Circuit in this case, like that of the Supreme Court in *Hoosier*, was prescribed by the Rules of Decision Act, 28 U.S.C. § 1652. The controlling nature of this statute when Congress has not specified the limitations provision to be applied to a private right of action was established nearly a century ago, in *Campbell v. Haverhill*, 155 U.S. 610 (1895). There the court stated:

> That this section embraces the statutes of limitations of the several States has been decided by this Court in a large number of cases, which are collated in its opinion in *Bauserman v. Blunt*, 147 U.S. 647. To the same effect are the still later cases of *Metcalf v. Watertown*, 153 U.S. 671 and *Balkam v. Woodstock Iron Co.*, 154 U.S. 177. Indeed, to no class of state legislation has the above provision been more steadfastly and consistently applied than to statutes prescribing the time within which actions shall be brought within its jurisdiction.

155 U.S. at 614.

The Rules of Decision Act establishes the path that the courts must follow in selecting the limitations period that will best fill the interstices of federal law. First, the courts are duty-bound to examine the law of the forum state to determine whether there is in that state's laws a limitations period that could be applied to the kind of action pending before the federal bench. *Sine v. Local*

No. 992, Inter. Broth. of Teamsters, 644 F.2d 997, 1002 (4th Cir. 1981); *O'Hara v. Kovens,* 625 F.2d 15, 17-18 (4th Cir. 1980), *cert. denied,* 449 U.S. 1124 (1981); *Forrestal Village, Inc. v. Graham,* 551 F.2d 411 (D.C. Cir. 1977). For "Congress has created many federal rights without prescribing a period for enforcement. In such cases the . . . applicable period of limitations is that which the state itself would enforce had an action seeking similar relief been brought in a court in that state." *Beard v. Stevens,* 372 F.2d 685, 688 (5th Cir. 1967).

It is only when the adoption of the analogous state statute of limitations would clearly be inconsistent with the policies underlying the federal action that the federal courts may proceed to a second step: fashioning a new federal limitations period by borrowing another federal statute's limitations period or by applying federal principles of equity. *Hyland v. Dennison Mfg. Co.,* 496 F.Supp. 939 (D. Mass. 1980); *EEOC v. Sheet Metal Workers Intern. Ass'n Local No.* 122, 463 F.Supp. 388 (D. Md. 1978); *Korn v. Merrill,* 403 F.Supp. 377 (E.D. N.Y. 1975), *aff'd,* 538 F.2d 310 (1976).

Applying this principle, the federal courts have borrowed state limitations periods in a variety of contexts. In *O'Hara v. Kovens, supra,* a state limitations period was borrowed for implied private rights of action under § 10(b) of the Securities Act of 1934, 15 U.S.C. § 78. *See also Forrestal Village, Inc. v. Graham, supra; Saylor v. Lindsley,* 391 F.2d 965 (2d Cir. 1968). In *Gruca v. U.S. Steel Corp.,* 495 F.2d 1252 (3rd Cir. 1974), a local limitations law was applied in a case filed pursuant to the Military Selective Service Act. Similarly, state statutes of limitations have been applied to express and implied rights of action filed pursuant to the antitrust laws, *Chattanooga Foundry v. Atlanta,* 203 U.S. 390, 397 (1906); *Bertha Bldg. Corp. v. National Theatres Corp.,* 269 F.2d 785, 788 (2d Cir. 1959), *cert. denied,* 361 U.S. 960 (1960); the

various civil rights laws, *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975) (Civil Rights Act of 1866); *O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914) (Civil Rights Act of 1871); *EEOC v. Sheet Metal Workers Intern. Ass'n Local No. 122, supra* (Title VII, 42 U.S.C. § 2000e); *Jones v. Jones*, 410 F.2d 365 (7th Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); the National Bank Act, *Cope v. Anderson*, 331 U.S. 461, 463, 466 (1947); and the Patent Act, *Campbell v. City of Haverhill, supra.*

The federal courts have declined to borrow state statutes of limitations in only a very few narrowly defined situations, inapposite here. In *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) the Court would not adopt a local limitations period in a federal action for unseaworthiness that had been joined with an action for Jones Act negligence. There, the state statute of limitations was shorter than the Jones Act limitations period. Because the plaintiff was compelled to institute both actions in one proceeding, the Court would not allow the shorter state statute to limit the plaintiff's federal right. However, the Court did not go on to establish a uniform limitations period applicable in all unseaworthiness cases. *Id.* at 224.[15] To the contrary, a plaintiff in a § 301 action

[15]The Court also declined to borrow a state limitations period in *Occidental Life Ins. Co. of Cal. v. E.E.O.C.*, 432 U.S. 355 (1977). That case involved the timeliness of an action filed by a federal administrative agency. There the Court determined that Congress intended that there should be no limitation on when the agency could bring suit, in order to provide the E.E.O.C. with an unhampered ability to resolve disputes through conciliation. The interests of the affected employer were deemed to have been sufficiently protected by the time limitation placed on the filing of an E.E.O.C. charge by an individual. The decision of that case can have no bearing on the instant one, involving a private action brought by an individual, other than to underscore the fact that the courts will apply a statute of limitations to an action filed by an individual and that the statute, where not provided by Congress, is generally borrowed from state law. 432 U.S. at 367.

is not compelled to initiate his claims under § 301 and his unfair labor practice charges before the NLRB simultaneously or in the same forum.[16] Accordingly, there is no conflict between the proposed state statute of limitations and federal rights, as there was in *McAllister*. *See Newport News Shipbuilding & Dry Dock Co. v. N.L.R.B.*, 631 F.2d 263 (4th Cir. 1980).

Applying the principles announced in these cases and the Rules of Decision Act to the case now before the Court, it is fundamental that the arbitral limitations period discussed in *United Parcel Service Inc. v. Mitchell*, 451 U.S. 56 (1981), and utilized by the courts below is the period that must be utilized in § 301 actions against employers and unions.

B. The Refusal of the Lower Courts to Adopt the Administrative Limitations Period from the National Labor Relations Act and to Create a National Limitations Period in Del Costello's § 301 Action Was Proper.

The Fourth Circuit properly rejected Del Costello's assertion that a six-month limitations period be borrowed from the National Labor Relations Act's requirements for the filing of a timely administrative charge and applied to his civil suit brought under § 301 of the Labor-Manage-

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[16]He is also not precluded from filing a § 301 action and unfair labor practice charges at the same time. The fact that inconsistent results might be reached does not affect the validity of each proceeding. Indeed, if Del Costello had initiated his § 301 action when he allegedly filed a charge with the NLRB, the timeliness of his action would not now be at issue.

ment Relations Act.[17] The lower courts correctly applied *United Parcel Service, Inc. v. Mitchell, supra,* to the case at bar and borrowed Maryland's thirty-day statute of limitations for the vacation of arbitration awards.

Mitchell establishes that the most analogous state statute of limitations that can be applied in a § 301 action against an employer and a union is the one for the vacation of arbitration awards. The Court in *Mitchell* observed that since the adverse arbitration decision in *Mitchell,* as here, was binding on all parties, the employee was compelled to show that his union had failed to fairly represent him during the arbitration before he could reach the merits of his breach of contract allegation. The necessity

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[17]Petitioner did not assert that § 10(b) ought to be borrowed in the proceedings before the district court. Although the petitioner casually alluded to the existence of § 10(b) as an alternative statute of limitations provision in his briefs in response to the respondents' motions for summary judgment, at no time did he urge the district court to adopt that six-month limitations period. To the contrary, the petitioner expressly relied on judicial precedent that proclaimed the inapplicability of § 10(b)'s limitations provision to § 301 actions and stated that "it would be presumptuous to expect this Court to promulgate a new national policy establishing six month limitations for all § 301 actions . . ."

The petitioner's failure to urge implementation of § 10(b) before the district court defeats any argument he may have been able to raise at that level. *American Casualty Co. v. Morris,* 51 F.Supp. 889 (N.D. W.Va. 1943), *aff'd,* 146 F.2d 208 (4th Cir. 1944). The desirability of finalizing judgments and terminating litigation leads to the binding of a party to the theories presented to the district court. *In re Linda Coal and Supply Company,* 255 F.2d 653 (3rd Cir. 1958); *Booth v. State Farm Mut. Automobile Ins. Co.,* 138 F.2d 844 (4th Cir. 1943). If the petitioner felt compelled to raise this issue, the district court was the appropriate initial forum. Having failed to urge the application of § 10(b) at that initial stage in this proceeding, he should not be allowed to do so now.

of a successful attack upon the union's conduct made the lawsuit "more analogous to an action to vacate an arbitration award than to a straight contract action." 451 U.S. at 62 (footnote omitted). Accordingly, the ninety-day limitations period found under New York law was applied. In this action, brought in the United States District Court for the District of Maryland, Md. Cts. & Jud. Proc. Code Ann. § 3-224, read in conjunction with Md. R. P. E2 or Md. R. P. E4 would require the application of a thirty-day limitations period to the case at bar. *See Board of Education of Charles County v. Educational Association of Charles County*, 286 Md. 358 (1979); *Brophy v. McLean Trucking Company*, No. M-81-2197 (D. Md. Dec. 2, 1982) (available on LEXIS, Genfed library, Dist file).

Although *Mitchell* was certainly intended to apply to Del Costello's claims against Anchor, a careful reading of *Mitchell* reveals that its holding was designed to apply to the union as well as the employer. The only defendant before the *Mitchell* Court was the employer. 451 U.S. at 71. However, it was apparent to Justice Stevens that the Court's ruling would be equally applicable to both employer and union. Consequently, he filed a separate opinion, dissenting from application of the defense to unions. 451 U.S. at 72. To deny the efficacy of the limitations defense to unions would give full effect to Justice Stevens' dissent, rather than to the majority's opinion. Therefore, it was proper for the court of appeals to affirm the lower court's decision to apply Maryland's thirty-day limitations period to bar the petitioner's action against both Anchor and Local 557. To allow a disgruntled employee to bring a § 301 action against his union after the limitations period for an action against his employer has expired would indirectly give the employee an extended opportunity he would not otherwise be allowed to collaterally attack the validity of an unfavorable arbitration award. This would

unjustifiably intrude on the finality of the bargained-for award, unnecessarily enlarge the time within which the "law of the shop" is uncertain and interfere with the basic goal of industrial stability underlying the collective bargaining process.

The decision of the Supreme Court in *Mitchell* to apply a state statute of limitations to § 301 actions, followed by the courts below, rationally furthers the public policy of encouraging the rapid resolution of labor disputes without seriously conflicting with any other federal labor statute[18] or policy. Therefore, the continued application of state statutes of limitations is consistent with the directives of the Rules of Decision Act.

The Supreme Court recognized that *Mitchell* would compel the application of limitations periods of varying lengths, depending on the situs of the action. 451 U.S. at 63, n. 5, 64. However, numerous federal courts have traditionally held that the adoption of a nationally uniform limitations period in a § 301 action would be unwarranted judicial legislation. *E.g., Hoosier; Sine v. Local No. 992, Inter. Broth. of Teamsters,* 644 F.2d 997 (4th Cir. 1981); *International U. of Operating Engineers, etc. v. Fischbach & Moore, Inc.,* 350 F.2d 936, 937-38 (9th Cir. 1965).

In *Hoosier,* the Court discounted the need for uniformity in § 301 actions stating:

> The need for uniformity . . . is greatest when its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote – the formation of the

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[18]Application of varying state statutes of limitations in § 301 actions in no way affects a party's right or obligation to seek relief from an unfair labor practice before the NLRB. An action brought pursuant to 29 U.S.C. § 185 and an unfair labor practice charge are separate and distinct proceedings, provided to achieve different federal goals. *See Newport News, supra.*

> collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy.

383 U.S. at 702. This rationale has served as the premise for the federal courts' consistent application of state statutes of limitations in § 301 actions against employers and unions following an adverse arbitration award. It is a rationale that has retained its viability over the years when applied in its original context or in the closely analogous situation presented by Del Costello's action.

The appellate court in *Service Employees International Union, Local No. 36, AFL-CIO v. Office Center Services, Inc.*, 670 F.2d 404 (3rd Cir. 1982) cogently explained the basis for the application of *Hoosier's* teachings as follows:

> [A]ctions brought to enforce an arbitral award are separate from the arbitration process itself and only come into play after the arbitration has terminated. Thus, whatever need may exist for national uniformity regarding the use of the arbitration process for the private settlement of labor disputes, the same considerations do not require similar uniformity when the judiciary is called upon to enforce an arbitral award.

670 F.2d at 409. There, as in the instant case, there was no overwhelming need for uniformity in the selection or application of a statute of limitations once the underlying arbitration award was being contested.

The Rules of Decision Act commands the judiciary to search state laws to fill the gaps in federal laws left by congressional silence before looking to federal laws and creating a new statute of limitations from that source.

Campbell v. Haverhill, supra at 614, 616; *Sine* at 1002. The local limitations provision suggested by *Mitchell* and applied in this case effectuates federal labor policies without affronting federal labor statutes or concerns. Although a uniform statute of limitations might provide greater predictability in the field of labor relations, such a result is neither necessary nor certain. Therefore, the Court is bound to avoid the kind of judicial legislation suggested by Del Costello.

The words of Justice Black on this point are instructive. In *Smith v. Evening News Ass'n*, 371 U.S. 195, 202-203 (1962) (J. Black dissenting) he stated: "[I]f such drastic changes are to be wrought in the [Labor Management Relations] Act that Congress passed, it seems important to me that this Court should wait for Congress to permit that operation. [Footnotes omitted.]" Over the years, this Court and others have heeded this lesson. *E.g., Hoosier; Occidental Life Ins. Co. of Cal. v. E.E.O.C.*, 432 U.S. at 367; *International U. of Operating Engineers, etc. v. Fischbach & Moore, Inc.*, 350 F.2d at 938. Anchor submits that this case does not provide an appropriate vehicle for altering that well followed course.

It is unnecessary for this Court to reverse the long line of precedent supporting the application of a state statute of limitations in § 301 cases similar to Del Costello's at this time, in this case. The usurpation of Congress' legislative function by the judicial creation of a federal statute of limitations is simply unwarranted where, as here, the federal statute to be borrowed applies exclusively to administrative proceedings and there is a viable alternative to be found in the state laws. Consequently, this Court should affirm the decision of the Court of Appeals for the Fourth Circuit to abstain from applying the limitations period of § 10(b) to an action filed under § 301 of the Labor-Management Relations Act.

II.

RETROSPECTIVE APPLICATION OF MITCHELL IN FAVOR OF ANCHOR AND LOCAL 557 IS JUST AND PROPER

The United States Court of Appeals for the Fourth Circuit was correct in affirming the district court's application of the statute of limitations set forth in *Mitchell* to Del Costello's claims. In line with the traditional rule of American jurisprudence, the court must apply judicial case law as it exists at the time of the decision. *Lawson v. Truck Drivers, Chauffeurs & Helpers, Local Union 100*, Nos. 81-3722, 81-3540 (6th Cir. Jan. 17, 1983) (Supplemental Appendix A-1); *Cash v. Califano*, 621 F.2d 626, 628 (4th Cir. 1980); *National Association of Broadcasters v. F.C.C.*, 554 F.2d 1118, 1130 (D.C. Cir. 1976).

In the most recent case on this subject, the Sixth Circuit retroactively applied *Mitchell* and utilized Ohio's ninety-day arbitration statute to bar an employee's claims against his employer and unions despite clear past precedent within the circuit applying a lengthier limitations period. The court reasoned:

> [W]e do not believe that *Mitchell* represents the kind of "clean break" with past precedent contemplated in *Chevron* and [*United States v. Johnson*, ____ U.S. ____, 102 S.Ct. 2579 (1982)]. *Mitchell* was simply a "clarification," an attempt to impose a single policy and a single rule in a legally chaotic situation. *Mitchell* was intended to resolve widespread confusion and conflict in the circuits concerning the applicable statute of limitations in these cases. We do not think that a "clean break" occurs every time the Supreme Court clarifies the law by resolving an issue on which there is circuit conflict and confusion. To so hold would reverse the regular common law rule, applied in *Chevron* and *Johnson*, that we should not normally have one law for old cases and another law for new cases.

Lawson v. Truck Drivers, Chauffeurs & Helpers, Local Union 100, slip op. at 6-7.

Decisions of the other circuits also support retroactive application of *Mitchell* to Del Costello's case. For example, in *McNutt v. Airco Industrial Gases Division*, 687 F.2d 539 (1st Cir. 1982), Massachusetts' thirty-day limitations period was applied to an action against an employer that had been pending when *Mitchell* was decided. Similarly, in *Service Employees Intern. U. Local No. 36 v. Office Center Services, Inc.*, 670 F.2d 404 (3rd Cir. 1982), the court held that the Pennsylvania arbitration act limitations period applied and refused to adopt the federal arbitration act's limitations period. In *Edwards v. Sea-Land Service, Inc.*, 678 F.2d 1276 (5th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 4051 (U.S. Jan. 11, 1983) (No. 81-525), *Mitchell* was applied retroactively and a Texas statute of limitations was adopted.[19] The Seventh Circuit has also applied *Mitchell* retroactively, *see, e.g., Stevens v. Gateway Transportation Company*, 112 L.R.R.M. (BNA) 2177 (7th Cir. 1982) (Illinois ninety-day arbitration statute applied to dismiss action against union as well as employer.), as has the Ninth Circuit, *San Diego County Dist. Council, United Broth. Carpenters & Joiners v. G. L. Cory*, 685 F.2d 1137 (9th Cir. 1982) (California 100-day statute of limitations ap-

[19]Because the Texas arbitration statute was found to be inapplicable to labor matters, a different state statute was chosen. This case must be compared with the same circuit's decision in *Rigby v. Roadway Express, Inc.*, 680 F.2d 342 (5th Cir. 1982), which applied *Mitchell* retroactively to compel application of Mississippi's arbitration statute to an employee's claims against both his employer and union, as well as the Sixth Circuit's holding in *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), applying *Mitchell* retroactively but adopting the NLRA statute of limitations after Michigan's arbitration statute was found to be expressly inapplicable to labor disputes.

plied where there was no reasonable reliance on past precedent); *Washington v. Northland Marine Co., Inc.*, 681 F.2d 582 (9th Cir. 1982) (*Mitchell* applied retroactively, however the application of the arbitration vacation statute was neither urged by the parties nor adopted). Accordingly, the courts of appeals have uniformly upheld the retroactive application of *Mitchell* under the circumstances presented in the instant case.[20]

Retrospective application of judicial pronouncements has repeatedly been upheld throughout the annals of English and American jurisprudence. *E.g., Linkletter v. Walker*, 381 U.S. 618, 622-29 (1965). One view often expressed is that the law is a constant presence merely awaiting discovery and appropriate identification by judges. Nevertheless the courts have shown a concern for litigants who have actually relied upon the current status of the law in determining legal rights and responsibilities. This Court made an effort to balance and blend these concerns in *Chevron Oil Co. v. Huson*, 404 U.S. 91 (1971). The *Chevron* Court composed a three-part test to be utilized in deciding whether retroactive application of its decisions is warranted. These factors are:

1. Whether the newly announced decision establishes a new principle of law either by

   a. overruling clear past precedent upon which litigants have relied; or

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[20]*See also Flowers v. Local 2602 United Steelworkers of America*, 671 F.2d 87 (2d Cir. 1982) *cert. granted* No. 81-2408 (11/29/82); *Local 1020 v. FMC Corp.*, 658 F.2d 1285 (9th Cir. 1981); *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349 (9th Cir. 1981); *Christianson v. Pioneer Sand & Gravel Co.*, 681 F.2d 577 (9th Cir. 1982); *Hall v. Printing & Graphic Arts Union*, 112 L.R.R.M. (BNA) 2151 (7th Cir. 1982); *Davidson v. Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981); *Newton v. Local 801*, 684 F.2d 401 (6th Cir. 1982); *Sear v. Cadillac Automobile Co. of Boston*, 654 F.2d 4 (1st Cir. 1981).

b. deciding a question of first impression whose resolution was not foreshadowed;

2. Whether retrospective operation of the doctrine would enhance or hinder the policies of the newly announced rule; and

3. Whether substantial inequitable results would follow if the new ruling were applied retroactively.

All three of the factors listed in *Chevron* must be shown to favor only prospective application before a decision will be denied retroactive effect. *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1289 (7th Cir. 1980). This requirement is in accord with the often repeated admonition that the denial of retroactive application of judicial decisions to pending cases is the exception, not the general rule. The application of these factors to the case at bar demonstrates that retroactive application of *Mitchell* is just and proper.

A. Mitchell Did Not Establish a New Principle of Law.

1. Mitchell Did Not Overrule Clear Past Precedent on Which Del Costello Could Have Relied.

The *Mitchell* case followed the decisions of several courts that applied state statutes of limitations for actions to vacate arbitration awards to cases brought pursuant to § 301, when the substance of those proceedings involved disputes between the same parties heard and resolved by an arbitration panel. In characterizing these § 301 actions as actions to vacate arbitration awards, the Court stated that its position was consonant with *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) and *International Union, U.A.W. v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

The Court criticized the interpretation of *Hines* undertaken by the Second Circuit in *Mitchell*. The Court noted that *Hines* "strongly supports borrowing the limita-

tions period for actions to vacate arbitration awards." 451 U.S. at 61. This analysis is predicated on the need of the complaining employee to overcome an adverse arbitration award, through proof of union wrongdoing, before he is allowed to attack the merits of his breach of contract allegation. 451 U.S. at 62-63, n. 4. The *Hines* ruling was issued almost one year prior to Del Costello's termination. It offered him the same advice concerning the applicable statute of limitations as was apparent to the Court deciding *Mitchell*.

This the Court has consistently maintained that litigating parties rely upon their interpretations of lower court decisions at their own peril. A review of the status of fair representation litigation at the time Del Costello's alleged cause of action arose reveals that the law was not at all supportive of his position concerning limitations. The ruling of the Supreme Court in *Mitchell* overturned no federal precedent in effect at the time by which the petitioner should have initiated this action.

Decisions of the lower courts refute the contention that *Mitchell* overruled past precedents. In *Wallace v. American Telephone and Telegraph Co., Inc.*, 460 F.Supp. 755 (E.D. N.Y. 1978), decided scarcely one month after Del Costello instituted this litigation, the court stated:

> Judicial decisions to date line up solidly behind the view that, where there has been a previous arbitration award on the subject of a pending § 301 action, that action is governed by the short statute of limitations provided for actions seeking to vacate an arbitration award. *Barbarino* [*v. Anchor Motor Freight, Inc.*, 421 F.Supp. 1003 (W.D. N.Y. 1976)]; *DeLorto v. United Parcel Service, Inc.*, 401 F.Supp. 408 (D. Mass. 1975); *UMW v. Jones & Laughlin Steel Corp.*, 378 F.Supp. 1206 (W.D. Pa. 1974), *International Brotherhood of Teamsters, Local 249 v. Motor Freight Express, Inc.*, 356 F.Supp. 724 (W.D. Pa. 1973); *Lunceford v. Western Conference of Teamsters*, 74 Lab.Cas. (CCH) ¶ 10,160 (C.D. Cal. 1974); *Elrod*

> *v. Western Conference of Teamsters*, 66 Lab.Cas. (CCH) ¶ 11,941 (C.D. Cal. 1971), *aff'd*, 72 Lab.Cas. ¶ 14,197 (9th Cir. 1973); *Howerton v. J. Christenson Co.*, 65 Lab.Cas. (CCH) ¶ 11,569 (N.D. Cal. 1971). [Footnote omitted.]

460 F.Supp. at 758.[21] Indeed, all of the federal court authority cited by Del Costello in support of his hypothesis that *Mitchell* overruled clear precedent is either distinguishable or was decided subsequent to the events which are the basis of his claim. Therefore, Del Costello cannot demonstrate detrimental reliance.

Much of the authority to which the petitioner refers does not involve an attempt to vacate an arbitration award, as is present here, but instead relates to union refusals to arbitrate grievances.[22] Many of the other cases cited by Del Costello do not involve the raising of the same limitations defense argued here and in *Mitchell*.[23] Although at the time this case was filed some courts differed on their characterization of § 301 actions filed in the absence of a prior arbitration, they uniformly characterized actions like the petitioner's as ones to vacate

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[21]*See also Hill v. Aro Corp.*, 275 F.Supp. 482 (N.D. Ohio 1967).

[22]*Price v. Southern Pacific Transportation Co.*, 586 F.2d 750 (9th Cir. 1978); *Sanderson v. Ford Motor Co.*, 483 F.2d 102 (5th Cir. 1973); *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970); *DeArroyo v. Sindicato de Trabajadores Packing House*, 425 F.2d 281 (1st Cir. 1970); *Grant v. Mulvihill Brothers Motor Service, Inc.*, 428 F.Supp. 45 (N.D. Ill. 1976); *Mikelson v. Wisconsin Bridge and Iron Co.*, 359 F.Supp. 444 (W.D. Wisc. 1973).

[23]*Howard v. Aluminum Workers International Union*, 418 F. Supp. 1058 (E.D. Va. 1976), *aff'd*, 589 F.2d 771 (4th Cir. 1978) (The defendant union argued successfully that the plaintiff's claims were barred by application of Virginia's two-year tort statute of limitations. No argument was raised or considered concerning a statute for vacating arbitration awards. Moreover, no

arbitration awards for the purpose of assigning a limitations period when presented with that option.

Del Costello relies on only one decision from his circuit court of appeals, *Kennedy v. Wheeling-Pittsburgh Steel Corp.*, 81 L.R.R.M. (BNA) 2349 (4th Cir. 1972). However, that case did not involve an adverse arbitration award; it grew out of a union's refusal to prosecute a grievance concerning seniority rights. The plaintiff's claim was held to be time barred pursuant to West Virginia's five-year limitations period governing oral contracts. The court did not consider the union's contention that a shorter limitations period was applicable, because the union was able to prevail with the longer period.

Most of the remaining cases to which Del Costello refers were not issued until after Del Costello had filed his untimely complaint. For example, petitioner erroneously contends that *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215 (6th Cir. 1978), had some impact on his decision to defer filing this action. The Sixth Circuit's decision was issued on July 25, 1978, over one year after the origin of Del Costello's claim and four months after the

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prior adverse arbitration award was present in the case.); *Hines v. Anchor Motor Freight, Inc., supra* (The choice of a limitations period was not an issue in the case.); *Singer v. Flying Tiger Freight Line Inc.*, 652 F.2d 1349 (9th Cir. 1981) (The limitations argument was raised for the first time on appeal. 652 F.2d at 1353. This factor was sufficient for the district court herein to distinguish *Singer*. 524 F.Supp. at 724.); *Warren v. International Broth. of Teamsters, etc.*, 544 F.2d 334 (8th Cir. 1976); *Butler v. Local U. 823, Int. Bro. of Teamsters, etc.*, 514 F.2d 442 (8th Cir. 1975); *Brooks v. Southwestern Transportation Co.*, 97 L.R.R.M. (BNA) 2616 (N.D. Tex. 1978); *Gallagher v. Chrysler Corp.*, 613 F.2d 167 (6th Cir. 1980) (Decided after this action was commenced.); *DeVries v. Interstate Motor Freight Systems*, 91 L.R.R.M. (BNA) 2764, 78 Lab.Cas. (CCH) ¶11,332 (N.D. Ohio 1976), *aff'd*, 620 F.2d 302 (6th Cir. 1980).

initiation of this action. The petitioner could not have used *Smart*, a decision rendered after he filed this case, as a basis for forbearance.[24]

The plaintiff in *Kennard v. United Parcel Service, Inc.*, 531 F.Supp. 1139 (E.D. Mich. 1982), was found to be entitled to rely on *Smart*. The *Kennard* court concluded that *Mitchell* should not be retroactively applied as a result of Kennard's actual reliance on *Smart*, which had been rendered by a federal appellate court in the circuit of which Michigan is a part. Kennard had not initiated his action in accordance with Michigan's twenty-day limitations period because the holding of *Smart* allowed a three-year delay in commencing an action. *Kennard* was distinguished only one month later by another judge of the same district court in *Kikos v. International Brotherhood of Teamsters*, 526 F.Supp. 110 (E.D. Mich. 1981). Like the instant case, the *Kikos* litigation was filed on March 7, 1978 before the Sixth Circuit's ruling in *Smart*, so that reliance on that appellate ruling was impossible. The *Kikos* employee had no right to forbear from initiating his action since:

> Prior to the date when Plaintiffs brought this cause of action . . . and through and until July 25, 1978 [the effective date of *Smart, supra*], the law was in a state of disarray with regard to the appropriate statute of limitations in cases such as the one now before this Court. Thus, during the period which preceded *Smart, supra*, Plaintiffs knew, or should have known the need to take appropriate, immediate action.

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[24]Similarly, Del Costello could not have opted to defer instituting this action in reliance on *Mitchell v. United Parcel Service, Inc.*, 624 F.2d 394 (2d Cir. 1980), *rev'd*, 451 U.S. 56 (1981), a case that was not even filed at the time the petitioner finally commenced this action.

526 F.Supp. at 115. Similarly, Del Costello could not have relied on a ruling that was not issued until after his complaint was filed.[25]

Del Costello has cited this Court to only one case decided before this action was filed, involving both a prior arbitration decision and a timely assertion that the applicable statute of limitations is the one found in state law for vacating arbitration awards: *Lehto v. Underground Construction Co.*, 69 Cal. App.3d 933 (1977). Del Costello's reliance on this lone case, assuming that he knew of its existence prior to the time this suit was brought, was unreasonable and unwarranted. In *Lehto*, the state court refused to apply California's one hundred-day limitations period for actions reviewing arbitration awards. Instead, the court utilized the state's four-year contract limitations statute. Issued a scant few months before Del Costello's alleged cause of action arose, it is, however, in direct conflict with two more authoritative rulings of California's federal district courts, *Elrod v. Western Conference of Teamsters, supra*, and *Howerton v. J. Christenson Co., supra*. Both 1971 federal cases compel a plaintiff in a § 301 action filed subsequent to an unsuccessful arbitration effort to bring that action within one hundred days.

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[25]The Sixth Circuit in *Lawson* has extended the *Kennard-Kikos* approach. The appellate court held in *Lawson* that a plaintiff in a § 301 action filed with the Sixth Circuit could not safely rely on *Smart* as the definitive statement of when to file a timely suit, in light of the fact that decisions of the different circuits on this subject were in obvious disarray. This reasoning is even more compelling in the instant case. Even if *Smart* had been in existence before Del Costello's complaint was filed, he would have had no right to rely on a ruling issued beyond the district and circuit of his residence in light of the multitude of conflicting opinions from other courts.

This Court has held that even in the presence of scattered authority contrary to its eventual ruling, retroactive application of the subsequent decision is appropriate. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776 (3rd Cir. 1967), *rev'd*, 392 U.S. 481 (1968), an action brought under § 2 of the Sherman Act, the Third Circuit Court of Appeals concluded that damages could commence only from the date of the Supreme Court's ruling in *American Tobacco Co. v. U.S.*, 328 U.S. 781 (1946) which, according to the circuit court, had changed the burden of proof in Sherman Act cases. Reversing the Third Circuit in *Hanover Shoe*, the Supreme Court gave retroactive effect to the rule it enunciated in *American Tobacco*. The Court pointed out that the *American Tobacco* opinion had not "indicated that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by those courts." 392 U.S. at 496. Similarly, in *Mitchell* the Court did not indicate that it was adopting a radically new interpretation of existing authority. It follows then that retroactive application is as appropriate here as it was in *Hanover Shoe*.

It was neither the intent nor effect of the Supreme Court to overrule or radically change the status of the law with *Mitchell*. As early as 1967 federal courts had been applying similar limitations periods in order to conform with the national labor policies of encouraging the rapid resolution of labor disputes and ensuring the finality of grievance arbitration awards. *Hill v. Aro Corp.*, 275 F. Supp. 482 (N.D. Ohio 1967). At the time when Del Costello's claims could have been timely filed, no federal court decision existed to support the petitioner's contention that he relied on some now-invalid legal principle when he deferred the commencement of his action. Where as here, there is no reversal of a prior position, no novel issue, and

no clearly declared judicial doctrine within the circuit that was fundamentally altered by the new decision, Del Costello's contention of reliance is simply unjustified. His claim of reliance is purely a post-hoc rationalization that has no support in law or fact. It is a makeweight argument ignoring the state of the law at the time when he filed his action. Thus, consideration of the first prong of the *Chevron* standards compels retroactive application of *Mitchell*.

2. Del Costello Did Not Rely Upon Judicial Determinations In Deciding When To File His Action.

Del Costello had no legal basis for his determination in 1977 that he could forbear from instituting suit for eight months. However, even if the law had been different, Del Costello was required to demonstrate that he actually relied upon that law, rather than merely alleging that such reliance could have transpired. *Of Course, Inc. v. Commissioner of Internal Revenue*, 499 F.2d 754, 759-60 (4th Cir. 1974). *See also Porter v. Ashmore*, 421 F.2d 1186, 1189 (4th Cir. 1970).

At no point in the proceedings before the district court did the petitioner indicate that he relied to his detriment on any case. Indeed, Del Costello's own affidavit, submitted in connection with his argument on the statute of limitations, indicates that such reliance was absent. (J.A. 63-68.) The affidavit shows that he did not explain his plight to counsel until September, 1977. (J.A. 66.) Moreover, legal and factual research did not commence until the last week of December, 1977 and was not completed for more than an additional thirty days, in mid-February, 1978. (J.A. 68.) Thus, the statute of limitations expired before legal research was commenced, several months after Del Costello's termination was upheld at the arbitration hearing. Even if his tolling theory were meri-

torious,[26] the petitioner did not formally retain counsel until March 9, 1978 (J.A. 68), three months after he admits realization that legal action was appropriate. Actual detrimental reliance, a *sine qua non* of the *Chevron* test, is absent in the instant case. As a result, the lower courts' application of *Mitchell* to Del Costello's claims was appropriate and just.

3. The Supreme Court's Decision In *Mitchell* Was Foreshadowed By Prior Case Law And Was Not One Of First Impression.

A string of past precedents "paved the way" for the result reached in *Mitchell*. *Cash v. Califano*, 621 F.2d 626, 630 (4th Cir. 1980). The policies which those cases promoted were established by Congress and affirmed by the Supreme Court several years before this cause of action accrued. Indeed, the opinion of the Court in *Mitchell* was simply an authoritative restatement of the majority view on a relatively narrow issue of law.

Long before *Mitchell* reached the Supreme Court, it had been established that when a federal statute creates a right of action but specifies no statute of limitations, the state limitations period for analogous causes of action is to be applied. *Campbell v. Haverhill*, 155 U.S. 610, 614 (1895); *Walton v. United States*, 73 F.2d 15, 17 (8th Cir. 1934); *Bufalino v. Michigan Bell Tel. Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968), *cert. denied*, 394 U.S. 987 (1968); *Jones v. Jones*, 410 F.2d 365, 366 (7th Cir. 1969),

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[26]The district court did not resolve the issue of tolling. 524 F.Supp. at 723, 725. However, the First Circuit recently took the opportunity to resolve this issue on similar facts in *McNutt v. Airco Industrial Gases Division*, 687 F.2d 539, 543 (1st Cir. 1982). The court rejected the contention that Massachusetts' thirty-day arbitration statute of limitations should be tolled when the employee had sufficient notice of possible wrongdoing to cause him to file a charge with the NLRB during that thirty-day period.

cert. denied, 396 U.S. 1013 (1969). It has also been long settled that under certain circumstances, a dissatisfied grievant could upset the finality of an arbitral decision and vacate or reverse the arbitral body's result. *Hines v. Anchor Motor Freight, Inc., supra.* Thus the conclusion that an action is best characterized as one to vacate an arbitration award when it seeks the same relief or argues the same claims as the grievance placed before the arbitration committee, was apparent since the decision in *Hines. Mitchell,* 451 U.S. at 61-62. This conclusion was neither novel nor surprising, as the Court's decision was in harmony with the decision of the Third Circuit Court of Appeals in *Liotta v. National Forge Co.,* 629 F.2d 903 (3rd Cir. 1980), which itself was based on a number of lower court opinions. The result in *Mitchell* was foreshadowed by the decision of a majority of the courts. Therefore, in accordance with the guidelines prescribed in *Chevron,* the Court should signify its approval of the application of *Mitchell's* principles to the case now before it.

B. Retroactive Application of the Law of *Mitchell* Will Promote the Operation of National Labor Relations Policies.

Statutes of limitation expedite judicial processes by forcing litigants to promptly state their claims at penalty of forfeiture. Their value is magnified when applied in the labor relations context.

A well established goal of federal labor law is the "relatively rapid disposition of labor disputes." *Hoosier,* 383 U.S. at 707. An integral feature of that policy is grievance arbitration. In order to obtain the goal of rapid dispute resolution within the framework of grievance arbitration, the arbitration process must be both fair and final. Even the alleged unfairness of a particular arbitra-

tion cannot be allowed to undermine the reliability of the arbitrator's decision indefinitely. *Mitchell* declared that it is more undesirable, as a matter of national policy and law, to keep the results of a grievance arbitration in limbo for long periods of time than it is important to provide aggrieved parties with an extended opportunity to secure a rehearing of their grievance in a neutral forum.[27]

Not to apply *Mitchell* retrospectively would defeat the federal labor policy underlying *Mitchell*. *See Cash v. Califano*, 621 F.2d at 631. (A recent judicial determination was retroactively applied to a pending case because, as here, the rule of the case and the policy behind it were one.) The Congressionally described need for predictability in labor relations requires the rejection of claims raised by those like the petitioner, who might appear years from now to complain about arbitrations that occurred before *Mitchell* was announced. Deferral to the generally shorter limitations period is the only way to keep the "law of the shop," a concept first announced by the Court in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), a reliable and workable doctrine. As a result, retroactive application of *Mitchell* in this case will promote the federal policies detailed by the Court in *Mitchell*.

C. Retroactive Application of *Mitchell* Will Not Produce Substantial Inequitable Results.

The fact that the retroactive application of the rule of law set forth in the *Mitchell* case will deprive the petitioner in this particular action of his opportunity to challenge the grievance committee's award does not bar retroactive application. Faced with similar situations, the

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[27]This declaration has been uniformly interpreted by the circuit courts as a mandate for retroactive application of *Mitchell*. *See* text *infra at* 25-27.

courts have often denied a litigant's request for non-retrospective application of new case law.

The Court "is well aware of how to avoid the effects of applying one of its rulings retroactively." *Holzsager v. Valley Hospital*, 646 F.2d 792, 797 (2d Cir. 1981), quoting *Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064, 1073 (2d Cir. 1977). For example, in *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964) the Court specifically held that the rule of law announced therein would not be applied retroactively to either the case before the Court or to any other pending cases. In *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982), the Court applied the rule first set forth in that case to affirm the lower court's dismissal of the case at bar, but expressly held that the rule was not to be retroactively applied to other pending cases. Significantly, in *Mitchell* the Court said nothing that would suggest an intention to limit *Mitchell's* retroactive application. Consequently, contrary to petitioner's contention, *England* and *Northern Pipeline* are readily distinguishable and underscore the propriety of retroactive application of judicial law in this context.[28] Accordingly, this Court has already indicated that the equities lie in favor of retrospective application of *Mitchell*.

The development of a distinct rule on limitations for litigants dissatisfied with an arbitration award was foreseeable and consonant with the scattered decisions which have addressed the question. Because Anchor had a right to rely on the finality of the arbitration process or to expect that any dispute as to its finality would be raised within a very short time, the equities favor retroactive operation of *Mitchell*. Therefore, the Court should not hesitate to approve the decision of the Fourth Circuit

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[28]*See also Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

affirming the dismissal of Del Costello's claims against both Anchor and Local 557 on the basis of his failure to file his complaint before the expiration of the appropriate limitations period.

CONCLUSION

For the foregoing reasons, respondent Anchor Motor Freight, Inc. respectfully requests this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

No. 81-3722
81-3540

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD LAWSON (81-3722),
Plaintiff-Appellant,
v.
TRUCK DRIVERS, CHAUFFEURS & HELPERS, LOCAL UNION 100,
Defendant-Appellee.

GEORGE S. LEACH (81-3540),
Plaintiff-Appellant,
v.
UNITED STATES POSTAL SERVICE
and
NATIONAL ASSOCIATION OF LETTER CARRIERS
and
LOCAL 43, NATIONAL ASSOCIATION OF LETTER CARRIERS, et al.,
Defendant-Appellees.

BOTH CASES ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed January 17, 1983

Before: KEITH and MERRITT, Circuit Judges; PECK, Senior Circuit Judge.

MERRITT, Circuit Judge, delivered the opinion of the Court, in which PECK, Senior Circuit Judge joined. KEITH, Circuit Judge, (pp. 12-17) filed a separate opinion, concurring in part and dissenting in part.

Lawson v. *Local 100; Leach* v. *USPS* Nos. 81-3722, 81-3540

MERRITT, Circuit Judge. In these two *Vaca v. Sipes*, 386 U.S. 171 (1967) type actions for unfair representation against unions under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), the essential questions on appeal are: (1) whether *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981)[1] and *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), require that a 90-day, Ohio limitations statute for actions to vacate arbitration awards be applied to malpractice-type actions against unions for unfair representation, as well as for actions for wrongful discharge against employers; and (2) whether *Mitchell* should be applied retroactively to cases pending when *Mitchell* was decided. We hold that *Mitchell* applies retroactively to pending cases and that under *Mitchell* and *Badon* the Ohio statute of limitations governing suits to vacate arbitration awards applies to unfair representation actions against unions as well as to wrongful discharge actions against employers.

I. FACTS

A. Appeal No. 81-3540

The record reflects that on August 22, 1978, appellant Leach entered the Cincinnati, Ohio Post Office while intoxicated and shouted obscenities about his supervisor and two postal security guards. On August 29, 1978, Leach was issued a Notice of Proposed Dismissal from the Postal Service for conduct unbecoming a postal employee, effec-

[1] *Mitchell* applies a 90-day state limitations statute governing actions to vacate arbitration awards as the federal limitations analogue for actions against employers for wrongful discharge. It does so on the policy ground that "one of the leading federal policies" in labor law is the need for "relatively rapid disposition of labor disputes." 451 U.S. at 63.

tive October 6, 1978. The August, 1978, incident was not Leach's first employment problem. His disciplinary record included several warnings and two lengthy suspensions for bad conduct.

Leach's last infraction before his discharge, based on conduct similar to that for which he was ultimately discharged, was the subject of a grievance settlement which reduced his suspension from twenty-eight days to fourteen days. An important element of that settlement was that Leach join and actively participate in the Postal Service's alcohol recovery program for alcoholics. Leach was notified in the settlement that he would be discharged should subsequent disciplinary action be necessary because of continued unsatisfactory job performance. When he thereafter caused a disturbance at work, while drunk, on August 27, 1978, he was discharged.

On September 21, 1978, the defendant postal unions filed a grievance on Leach's behalf asking that Leach be reinstated. The grievance was denied by the defendant Postal Service and was eventually certified for arbitration by the unions. On February 20, 1979, the grievance was heard by Arbitrator Alan Walt. On February 27, 1979, Arbitrator Walt issued his award denying Leach's grievance. In denying the grievance and thus upholding Leach's discharge, the arbitrator found significant Leach's "progressively worsening disciplinary history caused by alcoholism."

Leach's complaint against the employer and the union under § 301 was filed on October 6, 1980, more than 17 months after the Arbitrator's decision. District Judge Carl Rubin entered a final order dismissing the complaint against the postal service for wrongful discharge and against the unions for unfair representation under the 90-day Ohio limitations statute for actions to vacate arbitration awards, Ohio Rev. Code § 2791.13 (1976).

B. Appeal No. 81-3722

In October, 1976, plaintiff Lawson, employed in Ohio by the Mason & Dixon Lines, Inc, as a truck driver, was discharged. The defendant Local 100 was the employee collective bargaining representative for the truck line. The company based the discharge on alleged dishonesty in connection with the cashing of two pay checks for the same work week. Plaintiff had gotten a duplicate check by stating that the original pay check had been lost or stolen; subsequently, both checks were cashed. Plaintiff filed a grievance under the collective bargaining agreement and the grievance was eventually assigned for hearing before the Joint Conference or Committee on October 20, 1976. That Committee, composed of equal numbers of Union and employer representatives, upheld the discharge. A handwriting expert testified for the employer that the endorsements on both the checks were in the plaintiff's handwriting. Neither the Union nor the employee produced an expert witness.

After the discharge the plaintiff engaged private counsel who retained the services of a reputable handwriting expert. The expert concluded that both of the checks had not been endorsed by the plaintiff but on the contrary one bore a forged endorsement. When the Union was informed of this new evidence, an effort was made to reopen the arbitration. The arbitration was reopened and a hearing set for April 20, 1977. The plaintiff, dissatisfied with his prior union representation during the grievance and arbitration process, insisted that he be represented at that stage only by his private counsel. As a result of a meeting with his counsel and the employer, the plaintiff was reinstated with full back pay based on the expert testimony obtained by private counsel.

The plaintiff sued the Union for unfair representation on June 16, 1977, more than 6 months following completion of the arbitration process. He alleged that the union had not properly represented him at the October 20, 1976, arbitration hearing and had failed to get plaintiff promptly reinstated when advised of the opinion of the new handwriting expert. District Judge Hogan dismissed the case as untimely under Ohio's 90-day limitations statute for vacation of arbitration awards, § 2711.13, Ohio Rev. Code (1976).

II. SAME LIMITATIONS STATUTE APPLIES TO BOTH THE WRONGFUL DISCHARGE AND THE UNFAIR REPRESENTATION CLAIMS.

In both cases, the employee appeals the dismissal of the case against the union on limitation grounds, and in the postal case Leach appeals the dismissal of the employer as well. In both cases the alleged wrongful discharge was addressed in the collectively bargained grievance and arbitration process and a final decision was rendered. If *United Parcel Service v. Mitchell, supra,* is applied retroactively – a question we will address momentarily – it is clear that the action against the *employer* in the postal case was barred by Ohio's 90-day arbitration statute. That was the holding of *Mitchell.*

The narrow holding in *Mitchell* covers the wrongful discharge case against the employer but does not necessarily cover the unfair representation case against the union, as Justice Stevens points out in his concurring opinion in *Mitchell,* 451 U.S. at 71. Since *Mitchell,* however, this Court has clearly held in *Badon v. General Motors Corp., supra,* that "the *Mitchell* rule also applies to Badon's unfair representation claim" because the same

statute of limitations should be applied to both branches of the labor dispute, 679 F.2d at 98. Judge Martin's opinion for the Court in *Badon* relied on *Gallagher v. Chrysler Corp.*, 613 F.2d 167, 168 (6th Cir. 1980), which states the policy of this Circuit that the same statute of limitations should apply to both wrongful discharge and unfair representation cases. Although, as Justice Stevens points out in his concurring opinion in *Mitchell*, the two causes of action conceptually are based on somewhat different theories, *Badon* and *Gallagher* are the law of this Circuit until overruled or reversed, and they require application of the same limitations statute to both types of actions– the wrongful discharge claim against the employer and the unfair representation claim against the union.[2]

III. RETROACTIVE APPLICATION OF MITCHELL

The rule of *Mitchell* should be applied retroactively to pending actions against employers and unions. The normal rule is that in civil cases a recent authoritative opinion interpreting the law should be applied to pending cases unless it represents a "clean break" with the past and unless in addition it would be fundamentally unfair or otherwise burdensome to so apply it, see *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971); *United States v. Johnson*, 102 S.Ct. 2579, n. 12, 2595 (1982).

As *Mitchell* makes clear, the law on the limitations question in § 301 wrongful discharge and unfair representation cases has been in a state of confusion for some time. This Circuit and other circuits, prior to *Mitchell*,

[2]Even under Justice Stevens' rationale, it would appear that the 6 month statute for unfair labor practices found in § 10(b) of the Act, 29 U.S.C. § 160(b) would bar the actions against the unions in both cases because neither were filed within 6 months.

had adopted various state statutes of limitations, depending on the pecularities of the limitations law of the state in question and the arguments of counsel in the particular case. Although *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215, 219 (6th Cir. 1978) ("action for wrongful discharge is not in the nature of a motion to vacate or modify an arbitration award") had rejected as not applicable the Michigan statute of limitations for setting aside arbitration awards, we do not believe that *Mitchell* represents the kind of "clean break" with past precedent contemplated in *Chevron* and *Johnson, supra. Michell* was simply a "clarification," an attempt to impose a single policy and a single rule in a legally chaotic situation. *Mitchell* was intended to resolve widespread confusion and conflict in the circuits concerning the applicable statute of limitations in these cases. We do not think that a "clean break" occurs every time the Supreme Court clarifies the law by resolving an issue on which there is circuit conflict and confusion. To so hold would reverse the regular common law rule, applied in *Chevron* and *Johnson*, that we should not normally have one law for old cases and another law for new cases. We note also that both this Circuit and others have assumed that the *Mitchell* rule applies retroactively; see *Badon, supra*, and *Davidson v. Roadway Express, Inc.*, 650 F.2d 902 (7th Cir. 1981). *But see Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349 (9th Cir. 1981) (*Mitchell* not retroactive). *Compare Singer with Local 1020 v. FMC Corp.*, 658 F.2d 1285, 1289-90 (9th Cir. 1981) (applying *Mitchell* retroactively).

IV. ADDITIONAL ISSUES IN LEACH CASE

In the postal case, *Leach v. United States Postal Service*, the plaintiff presents additional arguments that

the Ohio limitations statute on arbitration awards should not apply. We now consider those arguments.

A. The Effect of the Postal Reorganization Statute

Leach asserts that *Mitchell* is inapplicable because his claim against the United States Postal Service "is not of the 'hybrid type' claim pursuant to § 301(a), LMRA, but is predicated upon an independent jurisdictional statute, 39 U.S.C. § 409(b), which is in fact subject to an existing limitation period contained in 28 U.S.C." (Appellant's Brief at 16). The time limitation which *Leach* suggests should be applied pursuant to 39 U.S.C. § 409(b), a provision of the Postal Reorganization Act adopted in 1970, is the general six year statute of limitations set forth in 28 U.S.C. § 2401(a) governing civil actions brought against the United States. Leach bases this argument on the fact that his "claim is a contract claim asserted independently against" the federal government. (Appellant's Brief at 18).

This argument is incorrect. Section 2401(a) is not the applicable limitations statute. The grievance-arbitration process in the Postal Service came into the law in the Postal Reorganization Act of 1970. In passing the Act, Congress created "an independent establishment of the executive branch of the government of the United States," 39 U.S.C. § 201, whose labor relations are patterned after the private sector and to which the National Labor Relations Act applies, 39 U.S.C. § 1209. The national labor policy in favor of arbitration expressed in section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), is included in the Postal Reorganization Act. It authorized the collective bargaining parties to include "procedures culminating in binding third-party arbitra-

tion," 39 U.S.C. § 1206(b). To enforce the provisions of the collective bargaining agreement, Congress enacted 39 U.S.C. § 1208(b).

This Circuit and our sister circuits have uniformly held that 39 U.S.C. § 1208(b) is an analogue of Section 301(a) of the Labor Management Relations Act of 1957[3] and have consistently applied § 301 law to suits brought pursuant to 39 U.S.C. § 1208(b). *Malone v. United States Postal Service*, 526 F.2d 1099, 1103-1104 (6th Cir. 1975) (legislative intent of Postal Reorganization Act was to "bring postal labor relations within the same structure that exists for nationwide enterprise in the private sector"). *Accord, National Association of Letter Carriers, AFL-CIO v. United States Postal Service*, 590 F.2d 1171 (D.C. Cir. 1978); *Melendy v. United States Postal Service*, 589 F.2d 256 (7th Cir. 1978); *Winston v. United States Postal Service*, 585 F.2d 198 (7th Cir. 1978); *National Association of Letter Carriers v. Sombrotto*, 449 F.2d 915, 919 (2nd Cir. 1971).

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[3]Section 1208(b) of the Postal Reorganization Act of 1970, 39 U.S.C. § 1208(b), provides as follows:

> Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

Section 301 (a) of the Labor Management Relations Act of 1957 ("LMRA"), 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Thus, since the courts have applied § 301 case law to Postal Service labor relations cases arising under 39 U.S.C. § 1208(b) and since it is from the § 301 case law that *Mitchell, supra,* arose, *Mitchell* is clearly applicable to Leach's action against the Postal Service.

B. Leach's Assertion That His First Amendment Speech Allegations Remove His Case From The Application of UPS Is Without Merit.

Leach throws in the argument that since the alleged reason for his discharge from the Postal Service involved "an instance of speech" (mainly obscenities) and since speech is protected under the First Amendment of the United States Constitution, his case should be removed "from the restrictive application of the *Mitchell* principle" (Appellant's Brief 18-19). The Postal Service's answer to this argument is well-taken: "While he makes these contentions, Leach refuses to recognize, as he did in his arbitration proceeding, that it was his alcoholism which caused the misconduct which led to his discharge". (Appellee's Brief 17):

> "Moreover, even assuming *arguendo,* that Leach's speech was protected by the First Amendment, he cites no case to support a conclusion that the statute of limitations in challenging his discharge is therefore extended. Carried to its logical conclusion, Leach's argument is that anyone who is discharged will be afforded a longer period within which to file suit if he exercises his right of free speech and shouts an obscenity as he leaves his workplace. Such an argument not only lacks support in the law, it defies common sense." (Appellee's Brief 18.)

C. Amendment of Answer to Assert Limitations Defense

The District Court did not err when it permitted defendants to amend their answers to assert the *Mitchell*

statute of limitations defense. The scope of this Court's review of the District Court's decision to permit the Postal Service to amend its Answer is narrow. Review is limited to the question of whether the District Court abused its discretion in allowing the amendment. *Hayden v. Ford Motor Company*, 497 F.2d 1292 (6th Cir. 1974).

Rule 15(a) of the Federal Rules of Civil Procedure permits the amendment of pleadings. The Rule provides, in pertinent part, that:

> [A] party may amend his pleadings only by leave of court or by written consent of an adverse party; and *leave shall be freely given when justice so requires.* (emphasis added).

This Court, as well as others, has freely allowed the amendment of pleadings in the absence of substantial prejudice to the opposing party. *Estes v. Kentucky Utilities Co.*, 636 F.2d 1131 (6th Cir. 1980); *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479 (6th Cir. 1973); *Head v. Timken Roller Bearing*, 486 F.2d 870 (6th Cir. 1973). Our review of the record indicates that defendants asserted the *Mitchell* statute of limitations defense shortly after *Mitchell* was decided. We do not find present here the kind of prejudice that prevents amendment, and therefore we do not find that the District Court erred in permitting the amendment raising the limitations defense.

V. EQUITABLE TOLLING

Finally, the plaintiffs in both cases argue that general equitable considerations should appeal to the conscience of the Chancellor and should toll the running of the *Mitchell* statute of limitations. Their arguments here are similar to their retroactivity arguments. They basically

assert that the *Mitchell* rule, even if applicable, comes as a surprise and that it is unjust to refuse to hear their claims. We have reviewed each record carefully seeking to find equitable considerations that would justify an exception to the Supreme Court policy of rapid settlement of labor disputes or would otherwise justify tolling. We do not find any such considerations present. Lawson's claim for damages is that the union failed to find, employ and present at the arbitration hearing a handwriting expert. Leach's basic claim is that the union failed to persuade his employer to give him another chance. Neither of these claims presents facts indicating bad faith or wrongdoing on the union's part or any other circumstances that compel the conscience of the Chancellor to extend, set aside or make an exception to the law.

Accordingly, the judgments of the District Courts in Appeal Nos. 81-3722 and 81-3540 are affirmed.

KEITH, concurring in part and dissenting in part. I respectfully dissent from the Court's holding in No. 81-3722, *Lawson v. Local 100*. In its haste to dismiss Lawson's cause of action, the majority chooses to ignore some of the most important facts of this case. These facts are the crux of Lawson's cause of action. When viewed in the context of the relationship between a union and those it represents, they compel a different result.

First, the majority opinion notes in passing that "[n]either the Union nor the employee produced an expert witness" at the hearing before the Joint Conference or Committee on October 20, 1976. *Ante* at —. What the majority fails to state is that the Union promised to produce a handwriting expert at the hearing. The district court expressly held in its July 21, 1980 Memorandum on the Defendant's Motion for Summary Judgment,

> On a summary judgment motion it must be assumed that the Union agreed to obtain some expert examination, did not, and did not request a continuance of the hearing for that purpose.

Lawson's claim is that the Union made affirmative representations upon which he relied. Then the Union handled his claim in a perfunctory manner. *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). The majority's opinion completely ignores the underlying implication to be derived from these facts. That is, if the Union had not made the representation, Lawson himself would have been on notice that he might have to supply his own handwriting expert.

Second, the majority opinion states, "When the Union was informed of this new evidence, an effort was made to reopen the arbitration." *Ante* at —. This statement is not supported by the record. In fact, the record contains evidence which supports Lawson's conclusion that the Union ignored him.

The affidavit of Paul H. Tobias, Lawson's private attorney, states that he made repeated attempts to obtain the Union's help in vindicating Lawson. He wrote Mason & Dixon Lines, Inc. (the Company) several times and sent copies of the correspondence to the Union. There was no response. He wrote the Union's attorney and attached copies of an expert's report which purported to show that Lawson was innocent. Still, there was no response. He communicated with President Kiser of the Union Local several times only to be told to talk to the Union's attorney. The record suggests that only after it became clear the Company was willing to reopen the hearing did the Union take any action. The Union was alerted to Lawson's need for help at least as early as December 2, 1976. It offered no help until April 1977.

The majority implies that Lawson's settlement was the reason why there was no new rehearing. He employed private counsel, the majority maintains, because he was "dissatisfied with his prior union representation during the grievance process." *Ante* at —. One can hardly blame Lawson for insisting upon private counsel if the allegations of his complaint are true. He certainly should not be punished for refusing to trust his fate to the Union once more. Moreover, the Union had more than four months to fulfill its statutory duty. The Union told Lawson there was nothing else it or he could do under the collective bargaining agreement.

Third, the court's characterization of this as an action to vacate an arbitration award is incorrect. There is absolutely nothing in the record which indicates that Lawson wants to vacate the original arbitration award. He has no need to do so. The two parties in the arbitration proceeding were the Company and the Union. The latter purported to represent Lawson's interests. The Committee

made an award to the Company. Subsequently, Lawson was vindicated. The Company agreed to reinstate Lawson with backpay and all other benefits. This was done without vacating any arbitration award, and the record suggests that it was done despite less than diligent efforts by the Union. The majority opinion fails to explain how the present action against the Union for breach of the duty of fair representation can be characterized as an action to vacate an arbitration award.

Lawson is requesting only that he be made whole for the Union's breach of its statutory duty. The facts in this case are different from the facts in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1980). In *Mitchell*, Justice Rehnquist explained:

> Respondent suggests *Hines* actions might also be characterized as actions upon a statute, personal injury actions, or malpractice actions, all governed by a 3-year limitations period in New York, N.Y.Civ.Prac. Law §§ 214(2), 214(5), 214(6). All of these characterizations suffer from the same flaw as the effort to characterize the action as one for breach of contract; they overlook the fact that an arbitration award stands between the employee and any relief which may be awarded against the company.

Id. at 1564 n.4.

There simply is no support for the proposition that a pure claim that a union breached its statutory duty should be treated as if it were a hybrid claim against the Union and the Company. This holding is especially untenable in those cases where no arbitration award stands between the grievant and legal relief. The cases cited by the majority were all hybrid actions in which litigation against both

the Union and the Company was necessary to afford the grievant the relief requested.[1] In such cases, there might be some justification for applying the same statute of limitations against both defendants. There is no rationale, however, for applying this rule to claims like this one.

The majority relies on dicta in Judge Phillips' opinion for the Court in *Gallagher v. Chrysler Corp.*, 613 F.2d 167 (6th Cir.), *cert. denied*, 449 U.S. 831 (1980). In *Gallagher*, Judge Phillips stated, "We hold that, *in an action against an employer and a Union under LMRA*, the same statute of limitations ordinarily should apply as to both defendants." *Id.* at 169 (emphasis added). *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982), upon which the Court also purports to rely, was another claim against both an employer and a Union. In his opinion for the Court, Judge Martin reiterated the need for prompt resolution of labor disputes. The only case cited by Judge Martin for applying the same statute of limitations to both claims was *Gallagher*. *See Badon*, 679 at 98. As noted above, *Gallagher* expressly limits its holding to suits against both an employer and union.[2]

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[1] In *Gallagher v. Chrysler Corp.*, 613 F.2d 167 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980), the appellant charged that Chrysler had discharged him without good cause and that his union, by withdrawing his grievance before arbitration, had failed to represent him in good faith. Similarly, appellant Badon in *Badon v. General Motors Corp.*, 679 F.2d 93 (6th Cir. 1982) claimed that General Motors wrongfully denied him pension benefits and that the United Auto Workers had failed to fairly represent him in the processing of his grievances.

[2] In *Badon*, Judge Martin noted: "It would be contrary to sound judicial policy to encourage actions to recover only the costs of litigation where no underlying right can any longer be vindicated in the action." 679 F.2d at 98. Until today, this language seemed to

The majority's reliance on the national policy favoring prompt settlement of labor disputes is meaningless in this case. The underlying dispute has been settled without judicial intervention. Neither labor peace nor a dispute between an employer and employee is at issue. That is why it is anomalous to treat this suit as an action to vacate an arbitration award.

Furthermore, the Court's statement of "national policy" completely ignores competing national labor policies. As the Ninth Circuit has noted in its interpretation of *Mitchell*, ". . . uniformity of limitations periods, though desirable, is not the dominant consideration in selecting the appropriate statute of limitations. Rather, characterization of the claim is the touchstone." *Christianson v. Pioneer Sand & Gravel Co.*, 681 F.2d 577 n.1 (9th Cir. 1982).

The majority's attempt to treat this case as just another claim agains a union and employer is unfortunate. As other circuits have discerned, the Supreme Court's characterization of the *Mitchell* case does not require that all cases brought under § 301 of the LMRA be treated as an action to vacate in arbitration award. *See e.g., Hand v. International Chemical Workers Union*, 681 F.2d 1308, 1313 (11th Cir. 1982); *Christianson*, 681 F.2d at 579; *Flowers v. Local 2602 of United Steelworkers*, 671 F.2d

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be strong support for a well-reasoned proposition. That is, where the statute of limitations has run on an employer and the claim was brought against both the employer and the union, it would be absurd to allow the claim to proceed against the union since all the plaintiff can recover are his or her litigation fees. There is no reason to allow the plaintiff to generate needless litigation expenses. However, that is not the claim before us now. There is an underlying right which can be vindicated, Lawson's attorney fees which were made necessary by the alleged perfunctory representation by the Union.

81, 91 (2d Cir.)[3]; *cert. granted,* 51 U.S.L.W. 3404 (November 30, 1982); *Sear* v. *Cadillac Auto Co. of Boston,* 654 F.2d 4, 5 (1st Cir. 1981).

Because I believe this is a tort-like action for breach of a fiduciary duty, I would apply the most analogous state statute of limitations.[4] *See International Union, UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966); *Smart v. Ellis Trucking Co.,* 580 F.2d 215 (6th Cir. 1978), *cert. denied,* 440 U.S. 958 (1979). In *Newton v. Local 801 Frigidaire Local of the International Union of Electrical Workers,* 684 F.2d 401 (6th Cir. 1982), our Court concluded that suits in Ohio based on breach of the duty of fair representation should be governed by the six-year statute of limitations for liabilities created by statute. Ohio

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[3]In *Flowers v. Local 2602 of United Steelworkers,* 671 F.2d 87 (2d Cir. 1982), the Second Circuit refused to treat a duty of unfair representation claim against a union as an action to vacate an arbitration award. Rather the Court noted that "an action for breach of the union's duty fairly to represent its members at arbitration proceedings is closely analogous to an action for attorney malpractice." *Id.* at 91. The Supreme Court, in granting the writ of certiorari, also agreed to address the question of whether the statute of limitations against the employer in hybrid actions automatically applies to a duty of fair representation claim against the union. 51 U.S.L.W. 3404 (November 30, 1982).

The Supreme Court granted review in another case which presents similar issues. *DelCostello v. International Brotherhood of Teamsters,* 679 F.2d 879 (4th Cir.) (unpublished opinion), *cert. granted,* 51 U.S.L.W. 3403 (November 30, 1982). In *DelCostello,* the Fourth Circuit applied the same statute of limitations to both the claims of the employer and the Union. It applied a thirty-day limitations period rather than the six-month period of § 10(b) of the National Labor Relations Act.

[4]In *Newton v. Local 801 Frigidaire Local of the International Union of Electrical Workers,* 684 F.2d 401 (6th Cir. 1982), Judge Phillips, writing for a panel of himself and Judges Merritt and Jones, expressly considered and refused to apply the six-month statute of

Rev. Code Ann. § 2305.07 (Page 1981).[5] If the six-year statute of limitations is applied, Lawson's claim against the union is timely and he is entitled to a trial on the merits.

The majority's opinion in this case illuminates the wisdom of Justice Black's concern for the "interests of the injured employee, the only one who has anything to lose" during arbitration proceedings. *Vaca v. Sipes,* 386 U.S. at 209 (Black, J., dissenting). Because the majority's opinion unfairly penalizes the injured employee in this case, I respectfully dissent.

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limitations provisions applied in *Badon.* It is, therefore, surprising that the majority would suggest that the alternative to the three-month limitations period is the six-month period of § 10(b) of the NLRA.

This case is more analogous to *Newton* than *Badon. Newton* and the instant case were both breach of duty of fair representation cases against a union. *Badon* was a case against both an employer and the union. The court applied section 10(b) in *Badon* because Michigan appeared to have no appropriate state statute of limitations for actions to vacate an arbitration award.

Judge Krupansky's opinion for the Court in *Pitts v. Frito-Lay,* Slip Op. at ____ n.3 supports this view. He correctly notes that *Badon's* holding is that "in Michigan the courts must apply a *federal* statute of limitations to § 301 actions" (emphasis in original). But Ohio has a limitations period for actions to vacate an arbitration award thus making the six-month statute of limitations of § 10(b) wholly inapplicable to either Lawson's or Leach's claim.

[5]Ohio Rev. Code Ann. § 2307 (Page 1981) provides: "Except as provided in section 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

Another solution in light of the Supreme Court's holding in *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56 (1981) and Justice Steven's dissenting opinion in that case would be to apply Ohio's shorter malpractice statute of limitations (one year). Ohio Rev. Code Ann. § 2305.11 (Page 1981). In either case, Lawson's action would be timely.

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No. 81-2386

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PHILIP DEL COSTELLO,

Petitioner

Vs.

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, et al.,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Pursuant to Rules 34.4 and 35.3 of the Supreme Court, petitioner, Phillip Del Costello, hereby submits his reply brief on the merits.

ARGUMENT

In their various briefs, respondents and their supporting Amici Curiae disagree over some of the details, but they are united in one assertion. They appeal one and all to the national policy favoring the rapid disposition of labor disputes as a reason to select the shortest possible statute of limitations, governing all actions.

We believe the respondents' focus is myopic and their focus ignores important labor policies.

As the Court ruled after our brief was filed in Bowen v. Postal Workers, 51 U.S.L.W. 4051 (January 11, 1983), the duty of fair representation is an essential protection for workers who are compelled by government action to surrender their bargaining rights to the collective representatives of their fellow employees. Thus, this case requires the Court to reconcile two contrasting policies -- the national interest in peaceful resolution of labor disputes and the individual

right not to be treated unfairly by a labor relations system which is the product of detailed government regulation. In their rush to limit the time to file suit, respondents pay heed neither to the rights which they would delimit nor to the practical effect on those rights of the limitations which they request.

In this reply brief, we attempt to return the statute of limitations debate to its broader context. We first recall the purpose of the duty of fair representation, which respondents do not even deign to mention. We then show that, in practical effect, the limitations period sought by the Respondents will defeat the purposes of the substantive law which it would govern, although it is not necessary to serve the purposes by which they seek to justify it.

Finally, we show that our argument for 10(b) is properly before this Court, and that the rule of Mitchell v. UPS, 451 U.S. 56 (1981),

should not be applied retroactively.[1]

I

A SIX-MONTH LIMITATION PERIOD REFLECTS A MORE FAIR BALANCE OF THE STATUTORY POLICIES AT STAKE THAN FOES AN ARBITRAL PERIOD.

As justification for using in hybrid actions the extraordinary short statute of limitations which is applied by most states to actions to vacate an arbitration, respondents rely upon the national labor policy favoring the expeditious resolution of labor disputes. Expeditious resolution, however, is not the only aspect of the national labor policy. Fundamental fairness to employees, particularly in the light

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1. Local 557's argument is inaccurate and disingenious when it suggests (brief, at page 10) that Del Costello has abandoned this issue of a distinct limitation for unions, because this case has been consolidated with Steelworkers v. Flowers, in which that is the principal issue, so we have left that argument to the respondents in that case.

of the statutory imposition of a bargaining representative selected by a majority of employees is a value of equal, if not overriding, importance. The statutory period favored by respondents pays no heed to this aspect of the national labor policy which is responsible for judicial recognition of hybrid actions by individual employees for breach of duty of fair representation and of a collective bargaining agreement.

Indeed, as we show in Part A below, respondents' proposed period would, as a practical matter, eviscerate the cause of action it would govern. Moreover, this evisceration is not required to serve the interest in speedy and peaceful dispute resolution for the consequences of which respondents grossly overstate, as we show in Part B.

I-A

AN ARBITRAL LIMITATION PERIOD WOULD EVISCERATE THE DUTY OF FAIR REPRESENTATION AND THE RIGHT TO VINDICATE CONTRACTUAL CLAIMS WHEN THAT DUTY HAS BEEN VIOLATED.

The easiest way to assure the speedy resolution of disputes over grievances concerning the application of collective bargaining agreements would be to rule that arbitrations or union refusals to support an individual's grievance are final, without respect to the adequacy or fairness of the union's exercise of its exclusive control over employee access to the grievance procedure. In that fashion, both the union and the employer, as well as the employees, would be certain of their proper resolution of the dispute as soon as the grievance procedure was concluded, or as soon as the union decided against processing a grievance. That solution, however, has repeatedly been repudiated by this Court.

Thus, in Vaca v. Sipes, 386 U.S. 171 (1967), the Court recognized that the effect of the labor relations system which is strongly encouraged by federal law is to subordinate an individual

employee's right to seek an individual bargain with his employer to the collective interest of all employees in the bargaining unit. Considerations of both constitutional law and elementary justice thus give rise to the duty of fair representation, which has

> stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. 386 U.S. at 182.

See also IBEW v. Foust, 442 U.S. 42, 46-47 (1979). Even if there were only a small group of cases in which employees were thus deprived of any recourse, the purpose of this doctrine would be frustrated. As this Court stated, id. at 182-183,

> "To leave the employee remediless in such circumstances would be a great injustice." Id. 386 U.S. at 185-186.

Time and again, the Court has reiterated these principles and refused requests by unions and employers to restore their unreviewable

control over the grievance procedure. In Czosek v. O'Mara, 397 U.S. 25 (1970), the Court affirmed the right of employees to proceed against the union even if they chose not to pursue any claim against the employer. See also Bowen v. Postal Service, 51 U.S.L.W. 4051 (January 11, 1983). In Hines v. Anchor Motor Freight, 424 U.S. 554 (1976), the Court held that a union and an employer cannot avoid liability for their respective violations of the duty of fair representation and the collective bargaining agreement simply because an employee has, as the case law expressly requires, processed his grievance through arbitration. The Court quoted approvingly the words of the Court of Appeals for the Ninth Circuit:

> "For us, it makes little difference whether the union subverts the arbitration system by refusing to proceed as in Vaca or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case

> does the employee receive fair representation."
> 424 U.S. at 572, quoting Margetta v. PamPam Corp., 501 F.2d 179, 180 (1974).

The short arbitration statute which respondents would apply to hybrid actions would, for all practical purposes, prevent all but a few employees from pursuing claims which have been subverted in the arbitration process. A brief comparison of the typical arbitration process and the industrial grievance procedure plainly demonstrates why a short limitation period, although clearly appropriate for challenges to an arbitration by the parties who participated in it, is plainly unsuited for employee hybrid actions.

Arbitration is generally considered to be an informal cousin of a judicial proceeding. In the typical arbitration, each party participates in the proceeding through a representative whom it has itself chosen for the purpose. The representative is subject to instructions concerning

which arguments will be presented and must consult with the party; similarly, each party is entitled to attend the proceeding. The various legal and factual arguments about the alleged contractual or other controversies are thoroughly aired. If an action to vacate the arbitral award follows, the issues in the judicial proceeding will almost certainly be a replay of those which were advanced before the arbitrator, whether they relate to the fairness of the proceeding, the extent of the arbitrator's authority, or the arbitrability of the controversy.[2]

Moreover, both parties will normally be represented in the action to vacate by the same counsel who handled the arbitration. It is almost unheard of for a party to seek vacation of

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2. In addition, during the course of preparing for the arbitration counsel will undoubtedly learn, if they do not already know, of the extraordinarily short time allowed for an action to vacate the award.

an award because of malpractice of the party's attorney in handling the arbitration. Accordingly, it is perfectly fair to all parties concerned to require a discontented party to appeal from the arbitrator's decision in an amount of time which is roughly comparable to the time allowed for appeal from an adverse judicial decision.

These features are almost wholly absent from grievance arbitrations. First, an employee whose grievance is taken to arbitration has no choice of representative. Even assuming that the employee has voted in favor of the union itself in a certification election, the union cannot be replaced for the duration of the collective bargaining agreement. General Cable Corp., 139 N.L.R.B. 1123 (1962). Nor may the employee select among individual union agents or counsel. Malone v. Postal Service, 526 F.2d 1009 (Sixth Circuit, 1979).

The second difference pertains to the extent of the employee's right to control the conduct of the arbitration itself. The employee has no right to dictate the manner in which his representative will conduct the hearing -- Findley v. Jones Motor Freight, 639 F.2d 953 (Third Circuit, 1981), Ness v. Safeway Stores, 598 F.2d 558 (Ninth Circuit, 1979), Schleper v. Ford Motor Co., 107 LRRM 2500, 2503; or to be told what is being done with his grievance. Whitten v. Anchor Motor Freight, 521 F.2d 1335, 1341 (Sixth Circuit, 1975). Indeed, the employee does not even have the right to attend the arbitration or to know when it will be held. Welch v. Mason Dixon Lines, 509 F.Supp. 1069, 1071 (E.D. Tenn., 1980). Thus, it is entirely possible that, at the end of the arbitration period, the employee will be unfamiliar with the contentions of the parties concerning the employer's alleged breach of contract. It is therefore

unfair to expect the employee to rush into court as quickly as an aggrieved party to an ordinary arbitration.

Third, although the issues which will arise in the employee's 301 action against the employer may have been developed and aired during the arbitration, it is more likely that they have not, for no action is available unless the union has not provided fair representation. Even more important, however, is the fact that the issues vis-a-vis the union, concerning the adequacy of its representation, will not have been developed at all. There is no parallel in the normal context to develop the law and facts for the case before filing a complaint.

Finally, and most devastating to the employee who seeks to file suit against his union and employer, unlike the typical plaintiff seeking to vacate an arbitration, a worker must find an attorney to handle the suit. Not only can the

employee not rely on his former representative who has developed the necessary expertise concerning the facts and law pertaining to the contractual dispute; the worker can not even insist that information be furnished to the new representative. Indeed, given the fact that this data will be used to collect damages from the union which represented him, it is exceedingly unlikely that the union will knowingly furnish any assistance at all.

The process of finding an attorney and preparing a complaint provides additional reasons not to use standard arbitral limitation periods such as thirty days. There are a large number of lawyers who practice commercial law and are available to handle arbitration suits, either for defendants or for plaintiffs. By contrast, given the polarization of the labor bar, most practitioners find it difficult to represent both individual workers and either

unions or management. It can be readily seen that, as a result, there would be few attorneys who are both familiar with the intricacies of labor law and willing to take fair representation cases for plaintiffs. Assuming that the employee is able to find someone, a fair amount of time will necessarily be consumed just coming up to speed on the law, not to speak of investigating the facts to decide whether there is a tenable case. Inasmuch as defendants' costs and fees may be assessed against plaintiffs or their counsel in DFR cases, e.g., McCandless v. Great A&P Tea Co., 697 F.2d 198 (Seventh Circuit, 1983), counsel are normally unwilling to go forward without a preliminary investigation. Nor, for that matter, will counsel be willing to proceed, even with the investigation, until the employee has been able to provide compensation. This alone takes a fair amount of time for a discharged worker, particularly because the difficulties of

litigating fair representation cases and their very high risk tend to make contingent fee arrangements unattractive to lawyers.

For all these reasons, application of limitation periods which were developed for the vacation of normal awards in arbitrations would be wholly unsuitable for employee actions under Vaca and Hines. Indeed, the practical effect of such limitation periods will be to make the duty of fair representation all but unenforceable. The elimination of an individual's remedies without providing an adequate alternative would resurrect the constitutional due process problems which give rise to the duty of fair representation in the first place. Such limitation periods are made all the more unjust because they are unnecessary to serve other aspects of the national labor policy, an issue to which we now turn.

I-B

THE NATIONAL LABOR POLICY FAVORING EXPEDITIOUS AND PEACEFUL RESOLUTION OF DISPUTES DOES NOT REQUIRE ADOPTION OF ARBITRAL LIMITATION PERIODS.

The principal justification advanced to support borrowing arbitral limitation periods is that any longer period would allegedly disrupt the peaceful resolution of disputes through the grievance and arbitration procedure. This contention has never been satisfactorily documented; indeed, it has simply been made ex cathedra. We here show that, to the contrary, the allowance of a fair representation suit to attack arbitrations for a reasonable period following the award has no significant effect on the grievance and arbitration system.

Indeed, the statistics available from the Federal Mediation and Conciliation Service show that in the years following this Court's recognition of a post-arbitral cause of action in

Hines, the number of grievances taken to arbitration increased steadily. (FMCS Thirty-fourth Annual Report, Table 22, pp. 42, 43.

During these years, before UPS v. Mitchell, most courts applied a non-arbitral limitation period; yet, this longer period obviously did not discourage unions or employers from using arbitration to settle their disputes. Significantly, however, in the fiscal year beginning July 1, 1981, after Mitchell was decided, the number of arbitrations dropped precipitously. FMCS Thirty-fourth Annual Report, Table 22, pp. 42, 43.) Although we do not suggest that Mitchell discouraged arbitration, we do believe a more convincing case needs to be made for the necessity of short arbitration periods before the effects of such periods on the enforceability of the duty of fair representation are incurred.

The absence of a statistical correlation

is not surprising when one recalls the content of most fair representation cases. The unions and employers base their claims of disruption of the grievance arbitration system upon the theory that a longer statute impedes the ability of the parties to rely upon that system to give meaning and content to the collective bargaining agreement by adding to the "law of the shop". In fact, however, as we discuss in more detail below, grievances that give rise to hybrid actions tend to be primarily factual rather than precedential in nature; they tend to involve individuals rather than groups; and they are such a small fraction of the total number of grievances as to lack substantial impact upon the system as a whole.

First, although many grievances involve questions of the meaning of a collective bargaining agreement, those grievances tend not to be litigated in hybrid actions. The reason for this

is that the duty of fair representation pertains primarily to union failures to do an adequate job of investigating the facts, or to conscious decisions to kill a grievance for arbitrary, capricious or invidious reasons which are unrelated to the interest of the bargaining unit as a whole. However, when the union makes a conscious decision to trade off the interests of some workers in order to advance the interests of a different segment of the bargaining unit -- i.e., when the decision will have precedential effect on the law of the shop -- that is an exercise of discretion which is wholly consistent with the duty of fair representation. Humphrey v. Moore, 375 U.S. 335, 350 (1964), Ford Motor Co. v. Huffman, 345 U.S. 330, 337-339 (1953).

For similar reasons, hybrid suits tend to involve individuals rather than groups of workers. When the union has refused to process a grievance for a group of workers, it is more

likely that its reasons for refusing to do so involve a conscious trade-off rather than invidious hostility or capricious disregard of the interest at stake. These latter impermissible factors are more likely if a single individual's discharge is at stake and, in fact, there are more hybrid actions involving single discharges where the issue is simply whether there was good cause to support the discharge than those involving any other category of grievance.

Finally, because most unions represent their members not only fairly but extremely well most of the time, it is only an insignificant fraction of all grievances which ultimately are litigated in a hybrid action. Although no precise figures are available, Professor Feller roughly estimated that some one or two million grievances are submitted every year. (Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L.Rev. 663, 755 (1973))

Estimates of the number of grievance arbitrations range widely, from the vicinity of 7,000 by the FMCS, to "upwards of 10,000" by the National Academy of Arbitrators, to "as many as 100,000". See FMCS Thirty-fourth Annual Report 42 (1982); Feller, at p. 755 and n. 397.[3]

By comparison, because most unions, most of the time, provide representation which is not merely adequate but highly effective, hybrid actions number in the low hundreds. We are unaware of any precise figures, but the petition for certiorari in Flowers provides a fair indication. The AFL-CIO sought to assemble a comprehensive list of current prearbitration and post-arbitration fair representation cases in order to persuade the Court of the importance of the questions

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3. The figure would be higher if Teamster joint committee decisions are included, inasmuch as every Teamster grievance is submitted to such committees for disposition.

presented in its petition. The list, assembled by asking for cases from all members of the AFL-CIO lawyers organization, includes some 52 cases in which timeliness issues were decided. (Cert. pet., at pp. 9-11, n. 3, and 60 actions in which limitations issues have been raised but not yet decided; cert. pet. at 23a-24a.)[4] Even assuming that there have been two or three times as many cases filed in the last two or three years, the period covered by the AFL-CIO list, the number of pre and postarbitration cases nevertheless remains negligible, a fraction of one percent of the total number of arbitrations, and perhaps .01% of the total number of grievances. Moreover, in light of the high standard which must

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4. The list includes only cases in which timeliness issues were raised. However, in light of Mitchell, it is inconceivable that a defendant would refrain from raising a limitations defense. Accordingly, the list in the certiorari petition is probably comprehensive.

be satisfied in order to prevail on the fair representation claim, only a small percentage of these cases are ultimately won. Accordingly, it is difficult to believe that the claims of unions and employers that the adoption of one limitations period or another would constitute a significant threat to the industrial grievance and arbitration system.

In summary then, application of limitation periods such as six months pose no threat to the stability of the grievance and arbitration system. Any inconvenience they cause is far outweighed by the need to provide an effective remedy for breaches of the duty of fair representation and of the underlying contractual obligations which go unremedied because of the union's breach. Accordingly, arbitral limitation periods should not be imposed as a device to cut off almost all hybrid actions; the more realistic six-month period should be borrowed

from 10(b).

I-C

THE 10(b) ISSUE IS PROPERLY BEFORE THE COURT IN THIS CASE AS OUTLINED ABOVE.

Both Local 557 and Anchor Motor Freight urge the Court not to reach the applicability of a six-month statute of limitations by analogy to the NLRA on the theory that the issue is not properly presented here. They argue, first, that Del Costello failed to raise the argument below and, second, that a six-month limitations period has run. These contentions are based on selective quotations from the record below and upon a faulty analysis of the applicable law.

With respect to the alleged failure to argue 10(b), there is no question that, absent exceptional circumstances, this Court will not consider a question not raised in the Court of Appeals. United States v. Ortiz, 422 U.S. 891,

898 (1975); Adickes v. Kress & Co., 398 U.S. 144, 147, n.2 (1970); Neely v. Eby Constr. Co., 386 U.S. 317, 330 (1967). However, Del Costello's brief in the Court of Appeals thoroughly discussed the 10(b) issue (J.A. 282-290), and the union and employer fully responded (J.A. 291-297).[5]

The limitations defense, which depends upon which statute should be borrowed, is purely a question of law, which has been fully briefed

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5. They also argue that the issue was not preserved in the District Court. No such contention was raised in the Court of Appeals. Del Costello argued that although the District Court might be reluctant to decide the 10(b) issue which this Court has refrained from addressing, the unconstitutionality of applying Maryland's thirty-day arbitration period counseled in favor of either 10(b) or a longer state statute. (J.A. 275-276.) He also urged that his complaint was timely under 10(b) because the statute had been tolled by his efforts to exhaust his contractual remedies. (J.A. 264-276.) In fact, Del Costello cited this Court's concurring opinions in Mitchell advocating 10(b) before the District Court and also stated that either 10(b) or the Maryland Uniform Arbitration Act are the appropriate statutes to apply, if any. (J.A. 263, 264, 275, 276.)

both in this Court and below, and it would serve no useful purpose to refuse to address it simply because Respondents wish that it had been discussed at even greater length below. Cf. Bellotti v. Baird, 428 U.S. 132, 142, n.10 (1976).

The contention that the applicability of 10(b) is not properly before the Court because Del Costello would allegedly still be untimely is equally devoid of merit. Del Costello was required by this Court's decision in Republic Steel v. Maddox, 379 U.S. 650 (1965), to fully exhaust his contractual grievance procedures before filing suit. When on August 19, 1977 -- less than seven months before the Complaint was filed -- he received from Local 557 a copy of the joint committee's decision with an invitation to submit proposed corrections at the joint committee's meeting on September 20, 1977 -- less than six months before the complaint was filed -- Del Costello

reasonably concluded that this was an additional opportunity to use the contractual grievance procedure, which under Maddox he was required to exhaust. He therefore responded with a letter demonstrating that evidence had been improperly considered, was false, and did not support his discharge.

Now the union and employer tell him -- as they failed to do in response to his letter -- that he really didn't have an additional opportunity to exhaust, that the contractual procedure was concluded, that the opportunity to correct the joint committee's report was only a formality, and that, if his letter be construed as a request for reconsideration, it either could not be considered or was not made with sufficient formality. Factual support for these appellate arguments are curiously absent from the record below, and both respondents never responded to petitioner's affidavit before the

District Court despite the fact that they had time and opportunity to do so. If the respondents desired to resolve the factual dispute they raised for the first time before this Court, they should have done so before the District Court by filing an appropriate reply affidavit coupled with subsequent discovery, which they failed to do despite the express invitation of the petitioner. (See page 9, reply brief to opposition to cert. pet. in this case.) The contract is silent on the question of whether the joint committee's decision becomes final when it is rendered, when the parties are notified, or when the minutes are approved. (Article VII, Sec. 6; J.A. 211-212.) None of these questions appear in the record and are appropriate for consideration only by the trier of fact on remand.

However, the significant factual question is whether Del Costello's belief to the contrary

was unreasonable. Santos v. Carpenters District Council, 619 F.2d 963 (Second Circuit, 1980). The District Court did not expressly resolve this factual question, nor could it on a Motion for Summary Judgment. Rather, assuming, as it was required to do that Del Costello's time to file was tolled by his reasonable belief that he was still in the process of exhausting contractual procedures, the District Court ruled that suit was filed untimely on March 16, 1978, because it was more than thirty days after the union told him that the joint committee's decision had become final in late December 1977. (See pet. for cert., B-25, 27.)

In this posture, the Court should not refuse to decide the 10(b) issue on the theory either that the joint committee decision became final before September 20, 1977, or that Del Costello either knew or reasonably should have known before December of 1977 that the grievance

procedure had been concluded.

I-D

THE RULES OF DECISION ACT SHOULD NOT BAR THE SELECTION OF 10(b) BY THIS COURT IN THIS CASE.

Although the respondent, Local 557, has not invoked the Rules of Decision Act (28 U.S.C. 1652), Anchor places heavy reliance upon the statute as the basis for urging this Court to refrain from selecting 10(b) of the N.L.R.A. as the appropriate limitation period (pp. 13-18 of Anchor's brief).

This Court has interpreted the Rules of Decision Act to require the application of state law only when the state is the source of the substantive right to be enforced in order that uniformity may be achieved within the state. Holmberg v. Armbrecht, 327 U.S. 392 (1946, Frankfurter, J.); Guarantee Trust Co. v. York, 326 U.S. 99 (1945); Clearfield Trust Co. v. U.S.,

318 U.S. 363 (1943); 76 Harvard Law Review, pp. 1306, 1307 (1963). Since the source of the hybrid cause of action based upon breach of duty of fair representation is derived from the National Labor Relations Act and Labor Management Reporting Act, all of which are federal statutes and, more particularly, since the hybrid cause of action was judicially implied from the NLRA (see Vaca v. Sipes, supra), and argument in petitioner's brief (pp. 12 through 23), no extended analysis is required to demonstrate that the Rules of Decision Act does not apply to these issues.

I-E

MITCHELL SHOULD NOT BE APPLIED RETROACTIVELY.

The union and company urge that UPS v. Mitchell, supra, should be given retroactive application. Although they do not deny that the

majority of Circuits before Mitchell had expressly rejected arbitral periods, they perform a detailed dissection of the pre-Mitchell cases to show that, with the benefit of hindsight provided by Mitchell, counsel should have been able to distinguish many of them. In other cases, they argue, neither the union nor the employer ever raised an arbitral limitations period.

But that, we submit, is the very point. It is often easier to discover in hindsight a historic trend in the law than it is to know which way the law is going in the heat of the battle. The very facts that almost nobody raised arbitral limitations defenses and that, as we pointed out in our opening brief at pp. 46, 47, none of the many commentators who addressed the subject suggested an arbitral period, is cogent evidence that counsel here were reasonable when they concluded that a contract or tort limitations period would be applied. Indeed, no satisfactory

explanation is offered for the fact that even respondents' learned counsel did not pursue the arbitral theory until two months after the issuance of the first and only appellate decision to anticipate Mitchell, Liotta v. National Forge Co., 629 F.2d 902 (Third Circuit, 1980), and one month after this Court's grant of certiorari in Mitchell made that theory seem tenable.[6]

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6. Anchor lamely alleges in its n.8 that at a status conference the parties agreed, and the court ruled, that there would be no summary judgment motions until discovery was completed. There is no record citation and, in fact, the contention falsely implies that the respondents were compelled to proceed through thirty-three months of discovery and were not at liberty to raise legal arguments dispositive of the entire case. In one of the scheduling conferences, the District Court Judge simply established the customary procedures for expediting litigation. If respondents indeed believed that they had a viable limitations defense prior to Liotta and Mitchell, they could have raised the question at any time by a motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure, as suggested by Chief Judge Harrison Winter during appellate argument.

The union and employer further argue, based upon Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 418 (1968), that whenever the law is "murky", Local Br. at 17, the parties rely on the lower court interpretations of the law "at their peril". Local Br. at 18; see also Anchor Br. at 34. In Hanover Shoe, however, the Court found it unnecessary to pass on the possible prospective application of decisions in civil cases. When it did reach that question three years later in Chevron Oil Co. v. Huson, 404 U.S. 91 (1971), and in the later cases cited in our opening brief, it ruled not only that prospectivity is appropriate in "new principles of law" cases, as well as in "overruling clear past precedent" cases, but also a failure to anticipate the Court's eventual decision has been held "reasonable". (Br. at pp. 43, 44.) Nor did Hanover Shoe involve, as does this case, the extinction of a cause of action which has always

been a strong argument for prospectivity in this Court's cases.[7]

The union and employer barely respond to our arguments concerning the second and third elements of the Chevron test. They are able to argue that the operation of the national labor relations policies will be retarded by prospectivity only by ignoring every aspect of the national labor policy save the interest in curbing hybrid actions as much as possible. And their principal response to our equitable argument seems to be that because the Court did not expressly address retroactivity in Mitchell, it must necessarily have considered the equities and conclusively determined that retroactive

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7. Although Local 557 suggests that Holzanger v. Valley Hospital, 646 F.2d 792 (Second Circuit, 1981), is to the contrary, as Judge Meskill there observed (p. 798), that case is squarely within the principle barring prospectivity of jurisdictional rulings.

application would not be unfair. These contentions have been answered by our brief to the extent that they are not self-refuting.

Because Mitchell established a new principle of law which Del Costello reasonably did not anticipate, and because retroactive application not only is unnecessary to promote the national labor policy but would be unfair to employees like Del Costello, Mitchell should be limited to prospective application.

II

THE TEAMSTERS' PLEA FOR A SIX-MONTH LIMITATION PERIOD FOR PRE-ARBITRATION CASES SHOULD BE REJECTED.

Both cases before the Court involve grievances which were taken to arbitration. The amicus brief of the International Brotherhood of Teamsters nevertheless asks the Court for a broader ruling which, although borrowing

state arbitral limitations periods for post-arbitration hybrid actions, borrows the six-month period of Section 10(b) to govern hybrid actions which contest a union's failure to process a grievance.[9] We do not believe that this question is properly before the Court, However, in the event that the Court chooses to reach out to address the issue in dictum, we discuss it briefly here.

In short, we object to the Teamsters' attempt to have it both ways -- state limitation periods for post-arbitration cases and Section 10(b) for pre-arbitration cases.

There are several considerations applicable in the pre-arbitration context which make Section 10(b) far less appropriate there than in

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9. It is indeed strange that the International raises this issue, because the Teamsters customarily take every grievance, regardless of merit, to the joint committees, which they treat as a form of arbitration.

than in the post-arbitration situation.

First, insofar as an unusually short statute of limitations is based on the desire to provide prompt assurance of the legitimacy of the resolution of grievances, employers' and unions' expectations of finality are less legitimate in the pre-arbitration context. Of course, they may equally believe in both contexts that the resolution is "final" as between themselves. Indeed, even if there is no grievance procedure at all, the employer may safely conclude that a discharge is "final" insofar as an employee's contractual remedies are concerned. We submit, however, that the reason why expectations of finality were deemed by the Court in Mitchell to be particularly legitimate, and therefore especially worthy of immediate confirmation as final, even as against a possible fair representation claim, is that the grievance has been aired before a neutral third party, who has considered the

facts and arguments presented by both sides, and ruled accordingly. This guarantee of fairness is missing when the grievance has not been taken to arbitration, not to speak of cases where the union has never even processed the grievance in the first place. An unusually short limitations period is therefore not warranted.

Second, a statute of limitations need not be unusually short in the pre-arbitration context in order to provide assurances of finality as rapidly as in the post-arbitration context. By the time a grievance has resulted in an arbitration award, FMCS data show approximately two-thirds of a year on the average has elapsed since the grievance was filed. Bowen v. Postal Service, 51 U.S.L.W. 4051, 4057 n.4 (1983). Many grievances take even longer to reach arbitration. By requiring in Mitchell that a hybrid action be filed within three months, the Court gave

assurance that employers and unions could be sure of the finality of a dispute within about a year of the time when it arose. A six-month statutory period for pre-arbitral suits is unnecessary to provide such rapid assurance of finality.

Finally, the employee plaintiff in a pre-arbitral hybrid action faces a significant procedural hurdle -- internal union exhaustion -- which must be overcome before suit is filed, and which necessarily causes substantial delays in the initiation of litigation. In Clayton v. UAW, 451 U.S. 679 (1981), the Court ruled that before a union member may complain that his union has failed to process a grievance, he must use internal union remedies to appeal the refusal, so long as the remedies available through the internal procedures were equivalent to the remedies available in the Section 301 action and so long

as using those procedures would not otherwise be futile.[10]

In deciding whether or not to exhaust internal union procedures, the employee is thus placed in a cruel dilemma. If he fails to exhaust, the district court may, in its discretion, determine that exhaustion would not have been futile. If, on the other hand, the employee does exhaust, then the statute of limitations may run out during that period.

Of course, it is a partial solution to this last problem to hold that the statute does not begin to run so long as the employee is

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10. Most district courts would dismiss with prejudice, e.g., [cites] although the Court indicated in NLRB v. Marine Workers, 391 U.S. 418 (1968), that exhaustion doctrine only permits the courts to "stay their hands". 391 U.S. at 426. See also Clayton v. UAW, 451 U.S. 679, 688 (1981) ("policy of deferring judicial consideration"); Chadwick v. IBEW, F.2d. (D.C. Cir. 1982).

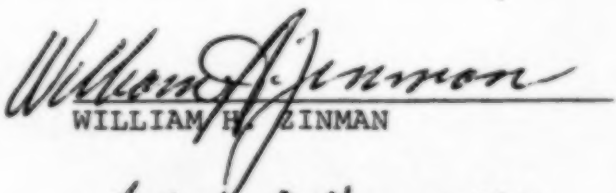
making reasonable efforts to exhaust internal union procedures. E.G., Santos v. Carpenters District Council, 619 F.2d 963 (2d Cir. 1980). Even in that case, however, if the employee fails to guess when the court would decide that exhaustion was not reasonable, and therefore unnecessary, he runs the alternate risk of dismissal for exhaustion or for limitations reasons.

For these reasons, if the Court chooses to address the appropriate limitations period for pre-arbitrations suits, it should reject the Teamsters' proposal.

CONCLUSION

For the foregoing reasons, and for all reasons listed in our opening brief, the decision of the Court of Appeals should be reversed and the case should be remanded for trial on the merits.

Respectfully submitted,



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IN THE

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OCTOBER TERM, 1982

UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC, ET AL.,

Petitioners,

v.

DONALD C. FLOWERS, AND
KING E. JONES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILIP DEL COSTELLO,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief Amicus Curiae Of The Chamber Of Commerce Of The United States Of America

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2408

UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC, ET AL.,

Petitioners,

v.

DONALD C. FLOWERS, AND
KING E. JONES,

Respondents.

No. 81-2386

PHILIP DEL COSTELLO,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, ET AL.,

Respondents.

BRIEF AMICUS CURIAE SUBMITTED BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is the largest business federation in the United States, with a

membership in excess of 235,000 corporations, proprietorships and individuals throughout the United States. More than 3,700 state and local Chambers of Commerce and trade associations are members.

The issues presented by *United Steelworkers of America, et al. v. Flowers, et al.* (No. 81-2408), and by *Del Costello v. International Brotherhood of Teamsters, et al.* (No. 81-2386), which has been consolidated herewith,[1] are of vital concern to the large number of Chamber members who are parties to collective bargaining agreements containing grievance and arbitration procedures for the resolution of labor disputes and who rely upon the smooth functioning of the private dispute-resolution machinery to preserve industrial stability and maintain productivity. The efficacy of a private dispute-resolution system obviously suffers if arbitration awards, on which parties rely to guide their conduct under the collective bargaining agreement, may be challenged long after they are rendered.

The *Flowers* decision permits employees to challenge their union's representation in an arbitration proceeding three years after the award is rendered: a challenge which, if successful, may remove the "bar" of finality and undercut the precedential value of arbitration awards. We urge this Court to reverse *Flowers* and to select a limitations period which will apply to employee § 301 claims against the employer and union alike and will adequately recognize the critical importance of a rapid resolution of labor disputes.

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[1] In addition to the issues concerning the appropriate statute of limitations in "hybrid" breach of contract-duty of fair representation proceedings under § 301, *Del Costello* also presents the question whether *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), should be applied retroactively — a question which the Chamber's amicus brief does not treat. The Chamber's brief discusses the issues raised in *Del Costello* only to the extent that they coincide with the issues presented in *Flowers*.

QUESTIONS PRESENTED

I. Does the state statute of limitations for vacating arbitration awards apply to a claim against the union in hybrid breach of contract-duty of fair representation proceedings under § 301?

II. If not, may the courts borrow either the three-month limitations period of the Federal Arbitration Act (9 U.S.C. § 12) or the six-month limitations period of the Labor Management Relations Act (29 U.S.C. § 160(b))?

SUMMARY OF ARGUMENT

Selection of an appropriate statute of limitations to govern the timeliness of employee claims against the employer and union in hybrid § 301 proceedings should be guided by the paramount objective of federal labor policy to ensure the prompt disposition of labor disputes. Options available to the Court in a hybrid breach of contract-duty of fair representation proceeding include (in descending order of desirability): (1) extending *Mitchell* and applying the state's statute of limitations governing the vacation of arbitration awards to the claim against the union;[2] (2) applying the three-month limitations period of the FAA uniformly to employee claims against the employer and union; (3) limiting *Mitchell* to the claim against the employer and applying to the union (a) § 10(b) of the LMRA or (b) a state tort or nonmedical malpractice statute of limitations; or (4) applying the six-month statute of limitations contained in § 10(b) uniformly to claims against the employer and the union.

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[2] In the few states which do not have specific limitations periods for vacating arbitration awards, we suggest that courts refer to an analogous nonarbitration state statute *if* compatible with the federal goal of rapidly resolving labor disputes. In the absence of an appropriate state statute, courts should borrow the three-month limitations provision of the Federal Arbitration Act (FAA), 9 U.S.C. § 12.

None of the foregoing alternatives offers a conceptually pristine model for selecting the appropriate statute of limitations. However, we suggest that extending *Mitchell* to claims against the union not only recognizes the inextricable link between the two elements of an employee's hybrid § 301 claim—the duty of fair representation and breach of contract—but also is consistent with *Mitchell*'s broad language. In addition, extending *Mitchell* strikes the appropriate balance between federal labor policy, with its emphasis on the rapidity of resolving disputes, and the principle of *Hoosier Cardinal*,[3] which *Mitchell* reaffirmed, that "state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question." 383 U.S. at 704.

Moreover, since the majority of states have enacted statutes allowing aggrieved parties 90 days within which to seek to vacate an arbitration award,[4] the practical consequence of extending *Mitchell* to claims against the union will be to promote a significant measure of desirable uniformity. In addition, if the Court borrows the three-month limitations period of the FAA to govern the timely filing of claims in the states which do not have specific limitations periods for vacating arbitration awards, uniformity will be enhanced.

Of course, uniformity may be accomplished far more

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[3] *International Union, United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966).

[4] Twenty-three states (including the District of Columbia) have adopted in large measure the Uniform Arbitration Act, which provides for a 90-day period in which to apply to vacate an arbitration award. At least five other states, while not adopting the Uniform Act, provide for 90-day limitations periods, and at least six states have statutes creating limitations periods shorter than 90 days. VIII Martindale-Hubbell Law Directory, Law Digests, Uniform Acts and A.B.A. Codes (1982 ed.); *see also Mitchell, supra*, 451 U.S. at 63 n.5.

directly by adopting the FAA's three-month limitations period for both claims—or, alternatively, but less appropriately, the six-month limitations period of § 10(b) of the LMRA. Judicial creation of a uniform limitations period is not without its drawbacks since Congress has considered the issue and declined to enact a uniform provision. *Hoosier, supra,* 383 U.S. at 703. In addition, neither the FAA nor the LMRA, which are the only potential candidates for adoption, provides an entirely adequate model. However, if this Court elects to borrow an analogous federal statute of limitations, we urge the selection of the FAA, which is more tailored to § 301 actions than the LMRA.

ARGUMENT

I. STATE STATUTES OF LIMITATIONS GOVERNING VACATION OF ARBITRATION AWARDS APPROPRIATELY APPLY TO EMPLOYEE CLAIMS AGAINST THE UNION IN HYBRID § 301 PROCEEDINGS

A. *Mitchell* Requires Application Of The State Statute Governing The Vacation Of Arbitration Awards To The Employee's § 301 Claim Against His Employer

The starting point of analysis, perhaps, is *United Parcel Service, Inc. v. Mitchell,* in which the Supreme Court, reversing the Second Circuit, concluded that a hybrid § 301 claim against the employer was more accurately characterized as an action to vacate an arbitration award, rather than a breach of contract action; and, accordingly, selected New York's 90-day statute of limitations governing the vacation of arbitration awards in lieu of the six-year contract statute of limitations for which the Second Circuit opted. In reversing the Second Circuit, the Supreme Court initially observed that since Congress did not enact a stat-

ute of limitations to govern § 301 proceedings, the timeliness of Mitchell's complaint was determined by reference to the appropriate state statute of limitations. 451 U.S. at 60, relying on *Hoosier, supra,* 383 U.S. at 704-705. In selecting an appropriate state statute, the Court examined the "nature" of the federal claim and the federal policies at stake.

As to the former, the Court concluded that Mitchell's claim, even though based on a contract, was more aptly characterized as an action to vacate an arbitration award since the aggrieved employee is not entitled to relief unless he overturns the arbitration award. Mitchell raised in the § 301 proceedings the very claim his union presented to the arbitration panel and requested the identical relief from the court that the union requested from the panel. In short, Mitchell was " 'dissatisfied with and simply seeks to upset the arbitrator's decision that the Company did not wrongfully discharge him.' " 451 U.S. at 61, quoting *Liotta v. National Forge Co.*, 629 F.2d 903, 905-906 (3d Cir. 1980), *cert. denied,* 451 U.S. 970 (1981).[5]

Moreover, Mitchell's claim against his employer could not accurately be characterized as a mere breach of contract since Mitchell was initially required to demonstrate that the union breached its duty of fair representation before the court could even reach the merits of his contract claim. Stated differently, the "indispensable predicate" (451 U.S. at 62) of Mitchell's § 301 suit was not the breach of contract, but a breach of representation, which is "more a creature of 'labor law' . . . than it is of general contract law." 451 U.S. at 63.

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[5] The Court rejected alternative characterizations of Mitchell's claims (*e.g.*, personal injury or malpractice) which similarly disregarded the essential point that an arbitration award "stands between" the employee and relief which may be awarded against his employer. 451 U.S. at 62 n.4.

Federal labor policy, which favors the "relatively rapid disposition of labor disputes," [6] supported the Court's selection of the shorter statute of limitations governing the vacation of arbitration awards. The Court expressly underscored the undesirability of allowing "the results of the grievance and arbitral process . . . [to be] suspended in limbo for long periods." 451 U.S. at 64. Recognizing that none of the available statutes of limitations "fit hand in glove," the Court suggested that selection of an appropriate state statute [7] be guided by federal labor policies.

B. *Mitchell's* Rationale, And Federal Labor Policies, Require Adoption Of The State Arbitration Statute To The Employee's Incidental Claim Against The Union

1. The inextricable link between the employee's representation claim against the union and his contract claim against the employer supports application of the identical statute of limitations

The *Mitchell* Court left open the question of which statute of limitations may appropriately be applied to an employee's unfair representation claim against the *union* in a hybrid § 301 proceeding.[8] However, a close reading of

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[6] *Hoosier, supra,* 383 U.S. at 707.

[7] In the Court's view, prior decisional law restricted its choice to state statutes. 451 U.S. at 64.

[8] *Mitchell* leaves open two additional questions which neither *Flowers* nor *Del Costello* directly raises: (1) whether state statutes of limitations governing the vacation of arbitration awards apply in a proceeding in which an arbitration award has *not* been rendered and (2) whether *Mitchell* applies to an employee claim against the union alone — *i.e.*, in a proceeding in which the employer has not been joined as a party defendant. As to (1), *Mitchell's* essential

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Mitchell supports adoption of the identical statute of limitations for a claim against the union.[9]

Initially, we underscore that nothing in *Mitchell* expressly *forecloses* application to the union of the state statute of limitations governing the vacation of arbitration awards. On the contrary, the rationale of *Mitchell* strongly militates in favor of applying the identical state statute of limitations to the two elements of the employee's hy-

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rationale — that the "indispensable predicate" of a § 301 claim is a "demonstration that the Union breached its duty of fair representation" (451 U.S. at 62) — applies equally in a context in which the union's breach prevents settlement of a grievance or its submission to arbitration and the rendering of an award. Regardless of the stage of the grievance-arbitration procedure at which the union breaches its duty, the employee is entitled to reach the merits of his contract claim only if he initially demonstrates breach of duty by the union. *See Hall v. Printing Union Local 3*, 112 LRRM 2151, 2154 (7th Cir. 1982) ("to apply a longer limitations rule to claims challenging arbitrated settlements than to non-arbitrated settlements would be to provide employers with a strong incentive to arbitrate every labor grievance regardless of merit"); *compare Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 572 (1976) ("[t]o us, it makes little difference whether the union subverts the arbitration process by refusing to proceed as in *Vaca* or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee"), quoting *Margetta v. Pam Pam Corp.*, 501 F.2d 179, 180 (9th Cir. 1974).

As to (2), the timeliness of a claim which an employee files against the union alone should be similarly governed by the state arbitration statute inasmuch as the employee's claim is linked to the employer regardless whether the employee sues the union alone or joins the employer.

[9] Justice Stevens, while emphasizing that the only question properly before the Court was whether the Second Circuit selected the most appropriate New York statute of limitations to govern the employee's claim against his employer, feared that the Court's decision could be interpreted to require application of the identical statute of limitations to the employee's claim against the union for breach of the duty of fair representation. Justice Stevens' acknowledgment that this interpretation would be "understandable" in light of *Mitchell's* "broad language" certainly supports the Chamber's reading of *Mitchell*. 451 U.S. at 72. (Stevens, J., concurring in part and dissenting in part).

brid claim. *Fedor v. Hygrade Food Products Corp.*, 533 F. Supp. 269, 272 (E.D. Pa. 1982) (*Mitchell* "requires" courts to apply the identical statute of limitations to employee claims against the employer and union), *aff'd*, 687 F.2d 8, 9 (3d Cir. 1982). The Court repeatedly emphasized the inextricable link between the employee's § 301 breach of contract claim against his employer and his breach of duty claim against the union:

> To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. [451 U.S. at 62, quoting *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976).]

See also Vaca v. Sipes, 386 U.S. 171, 183 (1967) (underscoring the "intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts," and observing that the question whether the union breached its duty of fair representation will typically be a "critical" issue in the employee's underlying breach of contract claim against his employer).[10]

Similarly, the Court pointed out that the employee's representation claim against his union is "more a creature of 'labor law' . . . than it is of general contract law." 451 U.S. at 63. The Court's reference to the "ancestry" of the claim against the union underscores that the two claims,

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[10] *Cf. Czosek v. O'Mara*, 397 U.S. 25, 28 (1970) (while rejecting unions' contention that the employer was an indispensable party in an analogous proceeding under the Railway Labor Act, the Court at least tacitly acknowledged that the injury to employees flowing from the union's alleged refusal to process their grievances has its "roots" in their discharge by the employer); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224 (1958) (applying identical statute of limitations to two closely interrelated claims — a maritime claim of unseaworthiness, for which federal law did not provide a statute of limitations, and a negligence claim under the Jones Act, which contained a three-year statute of limitations — even though the claims were varied in "elements of proof, type of defenses and extent of recovery").

which are perhaps equally "creatures" of labor law,[11] should be subject to identical statutes of limitations. Indeed, the juxtaposition of references to the employee's claim against the *union* and to the *employer's* perhaps "ultimate" responsibility to respond in damages (451 U.S. at 63) aptly illustrates the nexus between the two claims. If the link is indeed inextricable,[12] the justification for applying different statutes of limitations to the two interrelated claims evaporates.

2. The critical federal interest in rapidly resolving labor disputes, coupled with very practical considerations of judicial economy, dictates extension of *Mitchell* to § 301 claims against the union

The federal labor policies underlying the *Mitchell* Court's selection of New York's arbitration statute apply with perhaps equal force to employee claims against the union. Thus, the federal goal of rapidity is scarcely advanced if a labor dispute is permitted to fester for the considerably longer period of time contemplated by the *Flowers* court below. The disputants, including the employer, union and the aggrieved individual employee(s)—and, indeed, em-

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[11] Mitchell's claim of wrongful discharge derived from "just cause" notions, which are of fundamental importance in labor arbitration law. A significant body of arbitral law has evolved which defines the nature and scope of the just cause protections afforded employees. Moreover, the grievance and arbitration procedures which provide the mechanism for vindicating employee rights are a long-established feature of the collective bargaining system and are critical to its survival.

[12] Justice Stewart, while arguing in favor of applying § 10(b) of the LMRA, stated that "the two elements of respondent's hybrid action cannot be disentangled: the duty of fair representation is 'part and parcel of [the] § 301 [claim].'" 451 U.S. at 69 (Stewart, J., concurring in the judgment), quoting *Vaca v. Sipes*, 386 U.S. at 186. Even Justice Stevens, who argues that the two claims are "conceptually distinct," concedes their "close relationship." 451 U.S. at 73 n.2.

ployees covered by the collective bargaining agreement who are not participants in the dispute, but may be affected by its outcome—have an interest in the expeditious resolution of the *entire* controversy. The spectre of piecemeal litigation destabilizes collective bargaining relationships, which can scarcely inure to the advantage of individual employees whom the Second Circuit presumptively intended to benefit by applying to the employee's representation claim against the union the lengthy state malpractice statute of limitations.[13] Indeed, the precedential value of arbitration awards or grievance settlements will be seriously eroded if their status remains "in limbo" for the very long period contemplated by the *Flowers* rule.

Practical considerations of judicial economy support a rule that requires application of an identical, reasonably short statute of limitations, which may encourage employees to combine in a single proceeding their § 301 claims against the employer and union, consistent with federal labor policy. *See generally, Hines,* 424 U.S. at 567 (suggesting desirability of joining employer and union in a single proceeding); *Vaca v. Sipes,* 386 U.S. at 197 ("the employer may be (and probably should be) joined as a defendant in the fair representation suit"). Joinder of the employer and union in a single proceeding permits, in turn, a more intelligent fashioning of remedies in accordance with *Vaca v. Sipes.* Under *Vaca's* hierarchy of remedies, courts must initially consider the appropriate-

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[13] A lengthy limitations period seems particularly inappropriate in view of the typically very short statutes of limitations to which the parties are accustomed in the administration of collective bargaining agreements. Thus, if, in the interest of "rapidity," the parties allow themselves only three or four weeks to exhaust the several steps of a grievance procedure, why should the courts "encourage" a prolonged delay (perhaps three or more years) before the outcome of the dispute can be definitively ascertained? *Cf. Local 1020 of the United Brotherhood of Carpenters v. FMC Corp.,* 658 F.2d 1285, 1290 (9th Cir. 1981).

ness of an order compelling the employer and union to arbitrate the underlying grievance.[14] If a longer statute of limitations applies to the union, and the employee fails to initiate proceedings within the shorter limitations period applicable to the employer, a court could not very well order arbitration of the underlying grievance to remedy the union's breach of duty since the employer is obviously an indispensable party to the arbitration proceedings.[15]

If arbitration is not available, *Vaca* requires an apportionment of damages between the employer and union according to fault. If the employer and union are joined in a single proceeding, damages may be more intelligently apportioned in cases in which the union's breach of duty contributed to the employee's injury.[16] "What possible

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[14] While declining to restrict the employee's remedy to a decree compelling arbitration, the Court acknowledged that arbitration is "an" available remedy and, at least inferentially, the preferred remedy. 386 U.S. at 196. The Court explained that arbitration is not "inflexibly" required since the employee's injury may be partly attributable to the union's conduct, which an arbitrator may be powerless to remedy, or the arbitrable issues may be "substantially resolved in the course of trying the fair representation controversy." The Court pointed out that *under the foregoing circumstances*, courts should be "free to decide the contractual claim and to award the employee appropriate damages or equitable relief." 386 U.S. at 196. Indeed, Justice Fortas, concurring in the result, observed that the majority's remedial scheme provides for appropriate damages or equitable relief "apparently when arbitration is not available." 386 U.S. at 201.

[15] If, however, the *court* decides the contractual claim in the employer's absence, the union, although placed in a perhaps awkward position, could nonetheless defend the breach of contract claim on which the employee is required to prevail in order to recover from the union. At an arbitration hearing, of course, the union is *prosecuting* the grievance and can scarcely serve as the employer's surrogate.

[16] Damages attributable to the employer's breach of contract may not be charged to the union, but the union is responsible for increases in damages caused by its breach of duty. 386 U.S. at 197-198. *Bowen v. United States Postal Service*, 51 U.S.L.W. 4051 (Jan.

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sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer?" *Vaca*, 386 U.S. at 187. While the Supreme Court was referring to the difficulties associated with two independent tribunals (the Board and the courts) "repair[ing] a single injury," its observation aptly illustrates the difficulty of fashioning an appropriate remedy if the running of a shorter statute of limitations forecloses recovery against the employer.

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11, 1983) (No. 81-525). The *Bowen* Court, reaffirming *Vaca's* "governing principle," apportioned damages for an employee's wrongful discharge "where the default of . . . [the employer and union] contributes to the employee's injury" (Slip op. at 14) in accordance with the following formula: back pay accruing prior to a hypothetical date upon which an arbitration award would have been rendered had the union pursued the grievance to arbitration is attributable solely to the employer; damages accruing thereafter are attributable to the union. The Court suggested, however, that the manner of apportionment could vary with the "degrees of fault" (Slip op. at 17-18 n.19) of the employer and union and, in addition, a portion of the back pay liability otherwise attributable to the union could be shifted to the employer if the union "bring[s] its default to the employer's attention." (Slip op. at 14 n.15.) Application of *Bowen's* formula for apportioning damages may require the exercise of discretion by the trier of fact which joinder of the employer and union in a single proceeding will facilitate.

While obviously increasing the financial value of the employee's representation claim against the union, *Bowen*, we submit, does not undermine the long-established view that the gravamen of the employee's hybrid § 301 claim is the employer's breach of contract. Indeed, the employee recovers *nothing* from the union unless he establishes a breach of contract. *See Hines, supra*, 424 U.S. at 570-571.

Nor does *Bowen* undercut either the essential rationale of *Mitchell* —that an employee's hybrid § 301 claim, although based on a breach of contract, is more accurately characterized as an action to vacate an arbitration award—or the justification for its extension to claims against the union: *i.e.*, the inextricable link between the contract and representation claims (*supra*, in text at 9). Indeed, the *Bowen* Court does not even cite *Mitchell* or allude to the *Vaca/Hines/Mitchell* characterization of the relationship between the two claims.

C. The *Flowers* Court Erred In Applying A Different Statute Of Limitations To The Claims Against The Employer And Union

Notwithstanding the foregoing, the court below in *Flowers* would apply a different statute of limitations to the claims against the employer and union primarily because they are "conceptually distinct." [17] Admittedly, the claims are "distinct" in the sense that the nature of the evidence required to establish a breach of contract and a violation of the duty of fair representation varies significantly; the defenses vary; and the remedies may vary. Nonetheless, the employee suffers a "single," underlying injury (*Vaca*, 386 U.S. at 187) flowing from the employer's conduct

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[17] While the post-*Mitchell* Courts of Appeals have reached inconsistent decisions on the applicability of *Mitchell* to claims against the union (*infra* at n. 19, 20), the majority of pre-*Mitchell* Courts of Appeals, perhaps anticipating *Mitchell*, applied the identical statute of limitations to claims against the employer and union alike. *Liotta v. National Forge Co., supra*, 629 F.2d at 903 (characterizing combined claims against employer and union as action to vacate arbitration award); *Gallagher v. Chrysler Corp.*, 613 F.2d 167, 169 (6th Cir.) (the identical statute of limitations "ordinarily" applies to claims against employer and union), *cert. denied*, 449 U.S. 841 (1980); *Warren v. International Brotherhood of Teamsters*, 544 F.2d 334, 337 (8th Cir. 1976); *Butler v. Local 823, International Brotherhood of Teamsters*, 514 F.2d 442, 448 (8th Cir.) (applying Missouri's five-year written contract statute of limitations to claims against employer and union), *cert. denied*, 423 U.S. 924 (1974); *Kennedy v. Wheeling-Pittsburgh Steel Corp.*, 81 LRRM 2349 (4th Cir. 1972); *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1252 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971). *But see De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970) (applying Puerto Rico's one-year tort statute of limitations to bar employee claim against union in hybrid § 301 proceeding); *Sanderson v. Ford Motor Co.*, 483 F.2d 102 (5th Cir. 1973) (following *De Arroyo*). Recently, the First Circuit, while not expressly deciding the issue, "intimated" that, in light of *Mitchell*, Massachusetts' 30-day statute for the vacation of arbitration awards applies also to the employee's § 301 claim against the union. *McNutt v. Airco Indus. Gases Div.*, 687 F.2d 539, 542 (1st Cir. 1982); *accord Sear v. Cadillac Automobile Company of Boston*, 654 F.2d 4, 6-7 (1st Cir. 1981).

and while the union's breach of its duty may have increased, or contributed to the injury, its essential character remains unaltered.[18]

The *Flowers* court draws on language from *Mitchell* which purportedly supports application of a different statute of limitations to the claim against the union. Specifically, the Second Circuit cites the *Mitchell* Court's observation that the unfair representation claim is " 'more a creature of 'labor law' . . . than . . . of general contract law,' " coupled with its references to *Hoosier* and § 10(b). 671 F.2d at 89-90. *Hoosier*, of course, *rejected* the notion that the judiciary should create a federal limitations period, rather than resort to the most analogous state statute of limitations. In any event, the references to *Hoosier* and section 10(b) were intended not to suggest the appropriateness of applying § 10(b) to the claim against the union, but to underscore a leading federal policy favoring rapid disposition of labor disputes—a policy which, the Court noted, supported the selection of the shorter statute of limitations in *Hoosier* and *Mitchell*.

The *Flowers* court, while applying different statutes of limitations, acknowledged that the *Mitchell* dicta may well have supported a contrary ruling. 671 F.2d at 89. Indeed, in a pre-*Mitchell* decision, the Second Circuit *did* reach the

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[18] The *Flowers* court maintains that the employee's unfair representation claim is "closely analogous" to an action for attorney malpractice. 671 F.2d at 91. The different relief to which plaintiff is entitled in attorney malpractice and breach of duty actions significantly undercuts the analogy. An attorney guilty of malpractice may be responsible for the damages plaintiff would have recovered had he prevailed on his claim against the defendant. *Williams v. Bashman* 457 F. Supp. 322, 329, (E.D. Pa. 1978); *Sitton v. Clements*, 257 F. Supp. 63, 67 (E.D. Tenn. 1966), *aff'd per curiam*, 385 F.2d 869 (6th Cir. 1967). *Vaca* and *Bowen*, however, foreclose a similar standard of recovery against the union in a hybrid § 301 proceeding n. 16, *supra*).

contrary conclusion, applying the identical statute of limitations principally on the ground that the employee, in order to prevail on his claim against the employer, was first required to establish a breach by the union of its duty of fair representation—precisely the rationale relied on by post-*Mitchell* courts in extending *Mitchell* to claims against the union.[19] *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1252 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971). Inexplicably, the *Flowers* court does not refer to *Abrams*.[20]

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[19] *Service Employees International Union, Local No. 36 v. Office Center Services, Inc.*, 670 F.2d 404, 408 n. 7 (3d Cir. 1982) (statute governing the vacation of arbitration awards applies to claim against union); *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981) (accord).

[20] Courts of Appeals, in addition to the *Flowers* court, which have addressed the question and applied a different statute of limitations to the claim against the union either have eschewed independent analysis of the issues, *see Hand v. International Chemical Workers Union*, 681 F.2d 1308, 1313 (11th Cir. 1982) (following *Flowers* and applying state tort statute of limitations to claim against the union) or declined to apply the relevant state arbitration statute because of language therein excluding collective bargaining agreements from coverage. *Edwards v. Sea-Land Service, Inc.*, 678 F.2d 1276, 1284 (5th Cir. 1982), *petition for cert. filed* 51 U.S.L.W. 3511 (Dec. 21, 1982) (No. 82-1054); *Badon v. General Motors Corp.*, 679 F.2d 93, 99 (6th Cir. 1982) (applying § 10(b) to claim against the union in the absence of a Michigan statute applicable to vacation of labor arbitration awards). *But see Stevens v. Gateway Transportation Co.*, 112 LRRM 2177, 2179 (7th Cir. 1982) (applying Illinois' 90-day statute of limitations for vacating arbitration awards notwithstanding exclusion of awards entered pursuant to a collective bargaining agreement; "[w]e are not . . . bound by the letter of state limitation statutes to disserve the spirit of national labor policy"). A week before *Edwards* was decided, a different panel of the Fifth Circuit, observing that *Mitchell* had resolved the dispute among the Courts of Appeals concerning the appropriate state statute of limitations in a hybrid § 301 proceeding, applied Mississippi's statute for challenging arbitration awards to claims against the employer *and* union. *Rigby v. Roadway Exp., Inc.*, 680 F.2d 342, 343 (5th Cir. 1982). While *Rigby* assumed, without detailed analysis, that *Mitchell* extends to claims against the union, the decision undercuts the precedential value of *Edwards* and suggests that the law in the Fifth Circuit on the issue may not be altogether settled. [Continued on page 17]

II. IF MITCHELL IS NOT "EXTENDED" TO CLAIMS AGAINST THE UNION, THE COURT SHOULD BORROW THE MOST ANALOGOUS FEDERAL STATUTE OF LIMITATIONS, THE FEDERAL ARBITRATION ACT, TO PROVIDE A UNIFORM STANDARD GOVERNING THE TIMELINESS OF EMPLOYEE § 301 CLAIMS IN A HYBRID PROCEEDING

A. *Hoosier* Requires Reference To The Appropriate State Statute Of Limitations Absent A Compelling Need For Uniformity

The threshold question before the Court is the *appropriateness* of borrowing a federal, rather than a state, statute of limitations to govern hybrid § 301 claims in light of Congress' failure to establish a limitations period. In *Hoosier*, the Supreme Court, while recognizing that the timeliness of a § 301 complaint is governed by federal law and that "incompatible doctrines of local law must give way to principles of federal labor law,"[21] resisted the union's invitation to devise a uniform limitations period "to close the statutory gap left by Congress." 383 U.S. at 701. The Court acknowledged that as a consequence of its refusal to create a uniform limitations provision, the timeliness of § 301 suits would vary among the states. The

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If the Court accepts the view that an accurate characterization of the employee's claims against the employer and the union requires application of different statutes of limitations, *Mitchell* should continue to apply to employee breach of contract claims against the employer, whether or not raised in a proceeding in which the union has been joined as a party defendant. The timeliness of the claim against the union should be determined by § 10(b), rather than by tort or nonmedical malpractice statutes of limitations, which do not adequately recognize the critical importance of rapidly resolving labor disputes.

[21] *Local 174, International Brotherhood of Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962).

Court also acknowledged the desirability of a uniform standard governing § 301 suits. The Court concluded, however, that a lack of uniformity in the application of statutes of limitations would be "unlikely" to frustrate the achievement of a significant goal of federal labor policy—largely because statutes of limitations come into play only when the "consensual processes" that federal labor law seeks to promote—the negotiation of the collective agreement and the private settlement of disputes thereunder—have already broken down.

Absent a compelling need for uniformity and in view of evidence that the legislative omission of a uniform limitations provision was not inadvertent,[22] the Court adhered to a long line of consistent authority that state statutes of limitations govern the timeliness of federal claims unless Congress has expressly provided otherwise. Accordingly, *Hoosier*, which the *Mitchell* Court only recently reaffirmed, unambiguously requires reference to the appropriate state statute of limitations *unless* problems "vital to the implementation of federal labor policy" (*Hoosier*, 383 U.S. at 701) may be resolved or alleviated only by judicially creating a uniform limitations provision. *Compare Sine v. Local No. 992, International Brotherhood of Teamsters*, 644 F.2d 997 (4th Cir.) (under the Rules of Decision Act, federal courts may refer to an analogous federal statute of limitations to cure a legislative omission only if application of a state statute would frustrate federal law), *cert. denied*, 454 U.S. 965 (1981). By the same token, the Supreme Court has declined to borrow a state statute of limitations, the application of which would have frustrated the implementation of federal policy. *Occidental Life Insurance*

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[22] As the *Hoosier* Court pointed out, Congress considered the statute of limitations issue in amending the NLRA in 1947. Congress enacted § 10(b)'s six-month limitations provision after "appreciable controversy," it did not include a limitations provision in § 301. *Hoosier*, 383 U.S. at 703.

Co. v. EEOC, 432 U.S. 355, 367 (1977). Moreover, we recognize that a reasonably short limitations provision applied uniformly across state lines may eliminate the difficulties associated with different timeliness rules. *See San Diego County District Council of Carpenters v. Cory*, 685 F.2d 1137, 1140 (9th Cir. 1982). Accordingly, if the Court rejects the position that the salutary federal objectives of rapidity, uniformity and predictability are adequately served by "extending" *Mitchell* to § 301 claims against the union, and instead elects to borrow a federal statute of limitations, we urge, for reasons discussed below, selection of the FAA's three-month provision, which applies to arbitration proceedings, rather than the LMRA's six-month provision, which applies solely to unfair labor practice proceedings.

B. If The Interest In Uniformity Dictates Creation Of A Federal Statute Of Limitations For § 301, We Urge Selection Of The Three-Month Provision Of The Federal Arbitration Act

1. The FAA provides the most appropriate federal limitations period

The starting point of analysis, perhaps, is the Federal Arbitration Act itself, which generally provides for the enforcement of agreements to arbitrate. Section 12 of the FAA requires that motions to vacate or modify an arbitration award be filed within three months of its delivery. 9 U.S.C. § 12. We suggest that selection of a more analogous federal statute could scarcely be imagined in light of the very close interrelationship between § 301 and the FAA and the Supreme Court's characterization of a hybrid § 301 claim as an action to vacate an arbitration award. A significant number of courts have applied the FAA's limitations

period [23] or at least recognized its advantages.[24] Moreover, the federal limitations provision coincides with the limitations period established by the Uniform Arbitration Act, which many states have adopted.[25] In addition, the FAA's three-month provision enhances implementation of the federal goal of a rapid resolution of labor disputes. *Mitchell*, 451 U.S. at 63.

2. The ambiguous exclusionary language of section 1 of the FAA does not foreclose borrowing section 12's limitations provision

Courts rejecting the FAA rely heavily on its exclusion in section 1 of "contracts of employment" of seamen, railroad employees and workers engaged in foreign and inter-

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[23] *See San Diego County District Council of Carpenters v. Cory*, 108 LRRM 2336, 2336 (S.D. Cal. 1981); *Gas Workers Local No. 80 v. Michigan Consolidated Gas Co.*, 503 F.Supp. 155 (E.D. Mich. 1980); *Lumber, Production & Industrial Workers Local No. 3038 v. Champion International Corp.*, 486 F. Supp. 812, 813 (D. Mont. 1980); *Communications Workers of America v. Pacific Telephone & Telegraph Co.*, 462 F. Supp. 736, 739 (C.D. Cal. 1978) (FAA's statute of limitations supersedes state law in § 301 proceeding); *see also Bakery Workers, Local 434 v. Keebler Co.*, 104 LRRM 3181, 3182 (M.D. Ga. 1980); *Pizzuto v. Hall's Motor Transit Co.*, 409 F. Supp. 427, 429 (E.D. Va. 1976); *International Union, United Auto Workers v. LaCrosse Cooler Co.*, 406 F. Supp. 1213, 1215 (W.D. Wis. 1976) (compliance with 9 U.S.C. § 12 is a prerequisite of § 301 claim to vacate arbitration award); *compare Teamsters, Local 135 v. Jefferson Trucking Co.*, 473 F. Supp. 1255 (S.D. Ind. 1979) (motion to vacate arbitration award untimely under either Indiana law (90 days) or federal law (three months)), *aff'd*, 628 F.2d 1023 (7th Cir. 1980).

[24] *San Diego County District Council v. Cory, supra*, 685 F.2d at 1140-41 (recognizing the advantages of incorporating 9 U.S.C. § 12 but leaving to Congress the decision to create a uniform limitations period); *Local 1020 of the United Brotherhood of Carpenters v. FMC Corp.*, 658 F.2d 1285, 1289 (9th Cir. 1981) (applying Oregon's 20-day arbitration statute, but noting the desirability of borrowing FAA's three-month limitations provision).

[25] *See supra*, n. 4.

state commerce.[26] We contend that section 1's exclusionary language does not preclude borrowing section 12's limitations provision. "Contracts of employment" refer simply to *individual* employment contracts, rather than collective bargaining agreements. *Hoover Motor Express Co. v. Teamsters Local 327*, 217 F.2d 49, 53 (6th Cir. 1954); *Local 205, United Electrical Workers v. General Electric Co.*, 233 F.2d 85, 98 (1st Cir. 1956), *aff'd on other grounds*, 353 U.S. 547 (1957) (companion decision to *Lincoln Mills*). Indeed, the FAA was enacted in 1925, long before collectively-bargained contracts were commonplace; accordingly, Congress could not very easily have intended to include *collective* agreements within the scope of 9 U.S.C. § 1's exclusion.[27] However, if cognizance of the distinction between individual employment contracts and collective bargaining agreements may be attributed to the Congress sitting in 1925, we submit that a legislative intention to include collective agreements would have been expressed more directly. *Local 205, United Electrical Workers v. General Electric Co., supra*, 233 F.2d at 100.[28]

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[26] *Service Employees International Union, Local No. 36 v. Office Center Services, Inc., supra*, 670 F.2d at 406 n. 6 (3d Cir. 1982) (opting instead for the relevant state statute of limitations); *Sine v. Local No. 992, International Brotherhood of Teamsters, supra*, 644 F.2d at 1002; *International Union of Operating Engineers v. Kerr-McGee Refining Corp.*, 618 F.2d 657, 659 (10th Cir. 1980).

[27] The sparse legislative history of the FAA indicates that the exclusionary language was added to section 1 at the behest of the President of the Seamen's International Union. Although the legislative history does not shed light on the Seamen's motive or purpose, the context does suggest that Congress' principal focus was on the exclusion of categories of employees, rather than on the nature of their contracts. *Tenney Engineering, Inc. v. United Electrical Workers, Local 437*, 207 F.2d 450, 452 (3d Cir. 1953) (*en banc*).

[28] When Congress intended to refer to *collective* agreements or contracts, it expressed itself far more clearly. Thus, the NLRA,

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In any event, the debate which raged thirty years ago on the scope of section 1's exclusionary language was effectively stilled by the Supreme Court in *Lincoln Mills.*[29] *Lincoln Mills,* which confirmed judicial authority under § 301 to specifically enforce a promise to arbitrate contained in a collective bargaining agreement, resolved doubts in favor of coverage of labor contracts under the FAA. *See, e.g., Gas Workers Local No. 80 v. Michigan Consolidated Gas, supra,* 503 F. Supp. at 157; *Lumber, Production & Industrial Workers Local No. 3038 v. Champion International Corp., supra,* 486 F. Supp at 813. Since *Lincoln Mills,* the FAA, including its limitations provision,[30] has been applied repeatedly in § 301 proceedings. For example, federal courts routinely rely on 9 U.S.C. §§ 10 and 11, which set forth, respectively, the grounds for vacating and modifying or clarifying an arbitration award, to guide resolution of the substantive question of the award's enforceability in § 301 proceedings. If the FAA may guide federal courts "on the merits" of an employee's § 301 claim, surely the statute may similarly guide resolution of the question of the timeliness of the claim.

We submit that courts may borrow the FAA's limitations provision despite the ambiguous exclusionary language of section 1. Thus, *Mitchell* itself recognized that none of the statutes which arguably applied would "fit hand in glove." Perhaps more significant, the *Mitchell* Court

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enacted in 1935, ten years after the FAA, is replete with references to "collective" bargaining. Moreover, § 301 refers explicitly to contracts "between an employer and a labor organization"—a qualification conspicuously absent from 9 U.S.C. § 1.

[29] *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957).

[30] See cases cited *supra,* at n. 23.

applied New York's arbitration statute despite its prohibition against a discharged employee's instituting proceedings to vacate an award. 451 U.S. at 61 n. 3; *see also Stevens v. Gateway Transportation Co., supra,* 112 LRRM at 2179 ("the relevant consideration [in *Mitchell*] was not whether New York would in fact apply the statute to claims like Mitchell's but whether the kinds of claims to which it would apply its statute were 'closely analogous' to Mitchell's"). Finally, the perceived "disabilities" of the FAA notwithstanding, the incorporation of its limitations provision promotes the dual federal labor policies of uniformity and rapidity. *Mitchell,* 451 U.S. at 63 n. 5 (referring to the FAA's three-month limitations period in conjunction with its discussion of the desirability of selecting the shorter state statute for vacating arbitration awards); *see also Hoosier,* 383 U.S. a 707 (selecting generally shorter state statute of limitations governing contracts not exclusively in writing comports with federal goal of "relatively rapid disposition of labor disputes").[31]

3. The selection of § 10(b) of the LMRA, although not entirely without support, neither conforms to legislative intent nor adequately recognizes the essential character of the employee's hybrid § 301 claim

The selection of § 10(b), in contrast to 9 U.S.C. § 12, neither conforms to clearly expressed legislative intent nor recognizes the essential character of the employee's hybrid § 301 claim. The legislative history of the 1947 amend-

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[31] An employee who fails to challenge an award within the 90 days contemplated by the FAA may not be altogether without recourse since under § 10(b) of the LMRA, he would have an additional 90 days within which to file an unfair labor practice charge against the union on the representation portion of his claim. Assuming, of course, that the union's conduct amounted to an unfair labor practice, the Board could fashion an appropriate remedy.

ments establishes that Congress left to arbitrators and the courts the principal responsibility for adjudicating disputes arising under a collective bargaining agreement, while reserving to the Board the responsibility for adjudicating unfair labor practices. Thus, under a proposed amendment, violation by employers or unions of "the terms of a collective bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration" would have constituted an unfair labor practice. S. 1126, 80th Cong., 1st Sess. 13 (1947), *reprinted in* I. Leg. Hist. LMRA, 99, 111. Nonetheless, the Senate Committee reporting out the bill emphasized that the Board should entertain claims of contract violation only "on a highly selective basis," when "alternative methods of settling the dispute have been exhausted or not available." S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947), *reprinted in* I. Leg. Hist. LMRA, 407, 429.

Significantly, the proposed amendment was deleted from the final version of the bill altogether, with the explanation that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual process of law and not to the NLRB." H.R. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947), *reprinted in* I Leg. Hist. of the LMRA, 505, 546. Instead, Congress enacted § 301 which, of course, provides the parties to a collective bargaining agreement a mechanism for judicial enforcement of contractual obligations.[32]

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[32] *See NLRB v. Strong*, 393 U.S. 357, 360-361 (1969) (Congress not only has denied the Board "plenary authority to administer and enforce collective bargaining agreements" but also established arbitrators and the courts as "the principal sources of contract interpretation"); *Charles Dowd Box Co. v. Courtney* 368 U.S. 502, 511 (1962) (in enacting § 301, Congress "decided to make collective bargaining agreements enforceable *only* in the courts") (emphasis added). The Board itself has long recognized that it is "not the proper forum for parties seeking to remedy an alleged breach of con-

[Continued on page 25]

The dichotomy between the Board and arbitral processes which the legislative history reflects underscores the inappropriateness of borrowing a limitations provision which so plainly applies solely to the NLRB's unfair labor practice proceedings.[33] We have previously demonstrated that the essential character of an employee's § 301 claim is the underlying breach of contract, which only rarely may even be accurately *characterized* as an unfair labor practice. Since the employee is seeking judicial enforcement of *contractual*, rather than *statutory*, obligations, incorporation of a statute of limitations from the LMRA, in preference to the more closely related FAA, would be rather anomalous.

Proponents of § 10(b) maintain that the policy behind § 10(b)—"to protect continuing collective bargaining systems from delayed attack"—applies with equal force in the context of hybrid § 301 proceedings. 451 U.S. at 68 (Stewart, J., concurring in the judgment). As Justice Stewart acknowledged, however, the underlying question whether a union which breaches its duty of fair representation thereby commits an unfair labor practice has not yet

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tract or to obtain specific enforcement of its terms." *United Tel. Co. of the West*, 112 NLRB 779, 782 (1955); *see also Hyde's Super Market*, 145 NLRB 1252, 1253 (1964), *enforced sub nom. NLRB v. Hyde*, 339 F.2d 568 (9th Cir. 1964); *cf. Consolidated Aircraft Corporation*, 47 NLRB 694, 706 (1943), *enforced*, 141 F.2d 785 (9th Cir. 1944). Of course, if the claim states *either* an alleged contract or statutory violation, the Board has concurrent jurisdiction. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967).

[33] The plain language of § 10(b) confirms the Congressional purpose to restrict § 10(b)'s statute of limitations to the NLRB's unfair labor practice proceedings. *Edwards v. Sea-Land Service, Inc.*, *supra*, 678 F.2d at 1291 (declining to adopt the limitations period contained in § 10(b), which applies only to unfair labor practices); *Flowers*, *supra*, 671 F.2d at 90-91 (rejecting application of § 10(b) which "relates only to administrative procedures established by Congress to resolve unfair labor practices").

been resolved. While the Board, and perhaps a majority of the Courts of Appeals, have concluded that a breach of the duty of fair representation constitutes an unfair labor practice, the contrary view is persuasively supported [34] and the Supreme Court has not addressed the issue. *Vaca v. Sipes*, 386 U.S. at 186 (assuming, without deciding, that the breach of duty is an unfair labor practice). In addition, the considerations cited by Justice Stewart in support of adopting § 10(b)—including the need for speedy and final resolution of labor disputes, the need for uniformity of procedures for similar claims, and the "clear Congres-

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[34] *Miranda Fuel Co.*, 140 NLRB 181, 199-202 (1962) (Members McCulloch and Fanning, dissenting), *enforcement denied, NLRB v. Miranda Fuel Co.*, 326 F.2d 172, 175-178 (2d Cir. 1963). While acknowledging that breaches of the representation duty may not be unfair labor practices, Justice Stewart maintains that § 10(b) nonetheless appropriately governs the timeliness of breach of duty claims since Congress clearly indicated in § 10(b) "when claims of a very similar or identical character must be brought." 451 U.S. at 67-68. Justice Stewart's position is significantly undercut by the legislative history of § 10(b). Thus, the limitations provision was added to § 10(b) when the NLRA was amended in 1947. The debate accompanying the adoption of the six-month period confirms that Congress intended its application only to administrative unfair labor practice proceedings. The only controversial issue before Congress on the statute of limitations was whether the six-month period was unreasonably short. In addition, Justice Stewart's position is difficult to reconcile with the fact that the duty of fair representation under the NLRA was first judicially recognized *six* years after § 10(b) was amended in 1947 to include a six-month limitations provision. *Ford Motor Co. v. Huffmann*, 345 U.S. 330 (1953).

Recently, the Seventh Circuit, undisturbed by the foregoing chronology, blithely concluded that the 1947 Congress may well have extended § 10(b)'s limitations rule to § 301 claims against the union *if* it had been cognizant of the issue. *Hall v. Printing Union Local 3, supra*, 112 LRRM at 2155. We underscore that § 10(b)'s statute of limitations and § 301 were enacted *concurrently;* accordingly, the Seventh Circuit notwithstanding, Congress' failure to incorporate § 10(b)'s six-month provision into § 301 is most consistent with the intent that federal courts refer to state statutes to supply the limitations period.

sional indication of the proper balance between the interests at stake" (451 U.S. at 70)—apply with at least equal force to the FAA.[35]

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[35] The FAA, of course, provides a significantly shorter limitations period which "only enhance[s] the implementation of federal labor policy." *Fedor v. Hygrade Food Products Corp., supra,* 533 F. Supp at 271-272. Insulation of the collective bargaining system from § 301 challenges 90 days after the rendering of an award preserves the stability of the system while affording aggrieved employees adequate opportunity to vindicate their rights if the system malfunctions. Indeed, statutes with even shorter periods have been applied consistent with federal labor policy. *Local 1020 of the United Brotherhood of Carpenters v. FMC Corp., supra.,* 658 F.2d at 1289-1292 (applying Oregon's 20-day arbitration statute); *Del Costello v. International Brotherhood of Teamsters,* 524 F. Supp. 721, 725 (D.Md. 1981) (30 days), *aff'd without opinion,* 679 F.2d 879 (4th Cir. 1982); *McNutt v. Airco Indus. Gases Div., supra,* 687 F.2d at 543 (30-day limitations period is not unreasonably short); *Fedor v. Hygrade Food Products Corp., supra* (applying 30-day period under the Pennsylvania statute which had been recently amended to reduce the limitations period from 90 to 30 days).

CONCLUSION

For the above stated reasons, this Court should reverse *Flowers* and extend *Mitchell* by applying state arbitration statutes to breach of duty claims against the union. Alternatively, the Court should apply the three-month limitations provision of the FAA, or, if not, the six-month period of the LMRA, to claims against the employer and union.

Respectfully submitted,

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No. 81-2386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP DEL COSTELLO,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

MOTION OF TEAMSTERS FOR A DEMOCRATIC UNION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF, AND BRIEF IN SUPPORT OF PETITIONER

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January 13, 1983

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MOTION OF TEAMSTERS FOR A DEMOCRATIC UNION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Teamsters For A Democratic Union ("TDU") respectfully moves this Court, pursuant to Rule 36.3, for leave to file a brief as *amicus curiae* in support of the petitioner. Although the petitioner granted his consent to the filing of this brief, both respondents withheld their consent. In support of this motion, TDU states:

1. TDU is a voluntary, unincorporated association of thousands of rank-and-file Teamster members seeking to reform and democratize their union, and in so doing, to make it more reponsive to their needs. Most

TDU members are covered by collective bargaining agreements, similar to the one in this case, which provide for the submission of their grievances to committees comprised of an equal number of union and employer representatives. Accordingly, the Court's disposition of this case will likely affect their rights under their labor agreements. Indeed, it will determine whether there will exist a meaningful "bulwark to prevent arbitrary [Teamster] union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor policy." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

2. Members of TDU and its predecessor organization, PROD, have an intimate familiarity with the structure and operation of the Teamster joint grievance committee process. In its brief, TDU will show how that process differs from the traditional grievance-arbitral process incorporated in most non-Teamster labor agreements. As in *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), and *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), which involved the same joint committee grievance process, the petitioner in this case is proceeding on the assumption that joint committees are legally equivalent to arbitrators and will not, therefore, present this Court with any analysis of the differences between the joint committee and arbitral models.

3. TDU will demonstrate how a joint committee decision, like the one in this case, to "deny" an employee's grievance is not the equivalent of an arbitral decision and why, therefore, it was error for the court to apply, pursuant to *Mitchell*, the Maryland statute of limitations for suits to vacate decisions by impartial arbitrators.

4. TDU will also demonstrate why the six-month statute of limitations in section 10(b) of the National Labor Relations Act is inappropriate in a "hybrid" suit by an employee against his union for breach of its duty of fair representation, and against his employer for breach of contract. Because this Court held in *Mitchell* that federal labor policy favors the rapid disposition of labor controversies, and because the 10(b) limitations period is the shortest period that would enable the petitioner to keep his action alive, none of the parties in this proceeding will present the reasons why a lengthier statute of limitations should govern such actions.

Accordingly, TDU respectfully urges this Court to grant its motion for leave to file an *amicus curiae* brief presenting relevant facts and arguments that would not otherwise be heard by the Court.

Respectfully submitted,

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BRIEF OF TEAMSTERS FOR A DEMOCRATIC UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTION

Through the years, this Court has molded a body of law to guide the judiciary in handling suits arising under collective bargaining agreements. In particular, it has sought to promote industrial stability by encouraging private dispute-settlement as a substitute for economic warfare. *See, e.g., Teamsters Local 174 v. Lucas Flower Co.*, 369 U.S. 95, 105 (1962); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 585 (1960). Accordingly, the Court has held that judges should ordinarily defer to arbitral

decisions since "plenary review by a court of the merits [of a grievance] would make meaningless the [contract] provisions that the arbitrator's decision is final, for in reality it would almost never be final." *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1968).

At the same time, in section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), Congress has directed the federal courts to hear suits arising under collective bargaining agreements. Frequently, such section 301 suits are brought by one of the two parties to the agreement, i.e., the union or the employer, against the other for breach of contract. In addition, the Court has recognized that section 301 was also designed to encompass suits by individual employees "seeking to vindicate 'uniquely personal' rights . . . such as wages, hours, overtime pay, and wrongful discharge" conferred by labor agreements. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976); *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962). Before seeking to vindicate these rights in a federal court, however, the Court has held that employees must exhaust their contract grievance procedures. *Republic Steel v. Maddox*, 379 U.S. 650 (1965). Of course, if the courts were thereafter required to defer automatically to the results of that process, section 301 would be rendered meaningless.

Accordingly, in *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court took an important step in assuring that section 301 would not be a meaningless provision for individuals who were prevented from exhausting the grievance process by their unions' failure to invoke arbitration. The Court had previously held that the

statutory conferral of authority upon unions to be the exclusive bargaining representation for all employees in a bargaining unit implied a concomitant "duty of fair representation", i.e., a duty to exercise that authority in the interests of all bargaining unit employees "without hostile discrimination, fairly, impartially and in good faith."[1] In *Vaca*, the Court integrated the fair representation doctrine into section 301 law:

> Because these contractual [grievance] remedies have been devised and are often controlled by the Union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.

Id. at 185. The Court then held that whenever the union violated its duty of fair representation by abandoning an employee's grievance short of arbitration, the employee would be entitled to a hearing in court on his breach of contract claim against his employer. Henceforth, the duty of fair representation was to serve as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id.* at 182. In *Hines v. Anchor Motor Freight, Inc., supra*, the Court subsequently extended this principle to cases where there had been a arbitral decision on the merits of a grievance, but the union had breached its

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[1] *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 204 (1944). *See also Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Humphrey v. Moore*, 375 U.S. 335 (1964).

duty of fair representation in the course of presenting the employee's claim, thereby subverting the arbitral process.

What statute of limitations should govern section 301 suits has been a point in contention from the very outset since the Congress failed to provide one. In *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), the Court declined to close this statutory gap by devising a uniform statute. Rather, it held that "the timeliness of a § 301 suit . . . is to be determined . . . by reference to the appropriate state statute of limitations." *Id.* at 704-05.

Subsequently, some courts focused their attention on the employee's claim against his employer and concluded that, as in *Hoosier Cardinal*, the statute of limitations for breach of contract should be adopted. Other courts looked to the duty of fair representation action against the union and concluded that either the statute of limitations for torts, or the statute for actions arising under statute should apply. *See The Developing Labor Law*, 1971-75 Cumulative Supplement, pp. 398-99 (1976); Fox and Sonenthal, *Section 301 And Exhaustion of Intra-Union Appeals*, 128 U. Pa. L. Rev. 989, 1000 n. 46 (1980).

In *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), the Court ruled that where a labor arbitration has occurred, the statute of limitations for vacating arbitral decisions should govern an employee's suit under section 301 against his employer. However, the Court did not consider what statute of limitations should govern an employee's suit against his union for breach of its duty of fair representation, or his section 301 action against an

employer where his grievance had not produced an arbitral decision. As a result of the Court's holdings in *Vaca v. Sipes, supra,* and *Hines v. Anchor Motor Freight, Inc., supra,* an employee frequently, although not necessarily, pursues claims against both his union and employer in a single "hybrid" suit. The proceeding below was such a hybrid action in which the court held that Philip Del Costello's action against his union should be governed by the same statute of limitation applicable to his action against his employer, namely Maryland's 30-day statute of limitations for vacating arbitral decisions.

In this brief, Teamsters for a Democratic Union ("TDU") will demonstrate that this decision was incorrect. In the first argument, TDU will show that a suit by a Teamster to review an adverse joint labor-management committee grievance adjustment is not the equivalent of a suit to vacate an impartial arbitration decision. Rather, Teamster suits merely seek review of their union's action to abandon their grievances short of the final step in traditional contract grievance procedure — adjudication before an impartial arbitrator. Therefore, a Teamster's action should not be governed by the limitations period for suits to vacate impartial arbitral decisions. In its second argument, TDU will demonstrate why application of the abbreviated arbitral statutes of limitation to suits by workers against their unions will effectively undermine the "bulwark" against arbitrary union conduct fashioned in *Vaca.* Such actions ought to be governed either by statutes of limitation for torts, or for actions arising under statute, not by the six month limitations period in section 10(b) of the National Labor Relations Act.

I. A TEAMSTER JOINT COMMITTEE "AWARD" IS NOT THE EQUIVALENT OF AN IMPARTIAL ARBITRAL DECISION AND SHOULD NOT BE GOVERNED BY A STATUTE OF LIMITATION FOR VACATING ARBITRAL DECISIONS

Dismissal of a Teamster's grievance by a joint union-management committee is not the equivalent of disposition by an impartial arbitrator, or arbitral tribunal headed by a third, neutral party. Although joint committee "decisions" are contractually described as "final and binding," they are not the type of impartial arbitral decision contemplated by the state arbitral statutes imported into section 301 law by the Court's decision in *Mitchell*.

In fact, an adverse joint committee decision is no more, nor less, than a decision by the Teamster's own union representatives to abandon his grievance at an early step in the grievance process, short of the type of arbitration contemplated by state arbitration statutes. To understand this proposition, one must examine the structure and operation of the Teamster joint committee and compare it to the more traditional grievance-arbitration process employed by most other unions to resolve disputes arising under collective bargaining agreements.

The Teamster joint committee is comprised of an equal number of Union and employer representatives — there are no neutrals or tie-breakers. For a committee to "decide" a grievance, there must be a majority vote. Therefore, it is axiomatic that whenever an employee's grievance is "denied" by a joint committee, one or more of the union representatives on the

committee must have voted to sustain the employer conduct which precipitated the grievance. As Professor David Feller has observed:

> "A decision by a joint committee that a grievance lacks merit, which has been analogized to an arbitrator's award, is thus simply an agreement by the union that management did not violate the agreement."

Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 837 (1973).

This is not to say there is anything intrinsically improper with the joint committee process. As this Court held in *Humphrey v. Moore*, 375 U.S. 335, 349 (1964), "a union must be free to sift out wholly frivolous grievances which would only clog the grievance process." It is to say, however, that a joint committee "decision" to deny an individual Teamster's grievance is the equivalent, for example, of a decision by a Steelworker's business agent to abandon a grievance at a step short of arbitration. In both cases, exercising judgment and discretion given by law to the union representative, the union has elected not to pursue the grievance to the next step in the contract grievance procedure.

In the instant proceeding, for example, the National Automobile Transporters Agreement (herein, the "Agreement") provided in Article 7 for a four-step grievance procedure: 1) informal settlement discussions, 2) submission to the Eastern Conference Joint Grievance Committee, 3) submission to the National Joint Committee, and 4) submission to arbitration. J.A. 151-53. Mr. Del Costello's grievance was carried

only to the second step where the Teamster representatives on the Eastern Conference Joint Committee voted to deny his grievance.

Another difference between the Teamster grievance process, and that employed by most other unions is that local Teamster officials do not customarily exercise discretion in sifting out frivolous grievances before submitting them to joint committees.[2] Although they may attempt informally to resolve a grievance, absent a favorable settlement, practically every grievance is automatically submitted to a joint committee where the sifting process actually takes place. If the Teamster committee representatives believe the grievance has merit, they either negotiate a settlement with the employer representatives, or deadlock the committee. Deadlocked grievances are automatically referred to another committee in a geographically ascending hierarchy of committees. A deadlock at the National Committee level in this case would have caused Mr. Del Costello's grievance to be referred automatically to an impartial arbitrator.[3]

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[2] In 1976, The Teamster Constitution was amended to confer such discretion, for the first time. *See* Proceedings of the 21st Convention, Art XIV, Sec. 3, pp. 344 (June, 1976). However, local officials continue to submit practically every grievance to the joint committee.

[3] *See* Agreement, Art. 7, Sec. 7, which provides *inter alia:* "if any grievance or disagreement is deadlocked by the National Joint Arbitrtion Committee . . . then both the Union and the Employer *shall* submit the grievance to a Board of Arbitration consisting of three (3) members", one appointed by the union and one by the employer who together select a third, "disinterested arbitrator." J.A. 152-53 (Emphasis added.)

Some Teamster contracts do not provide for submission of grievances deadlocked at the national level to arbitrators. Rather, like the National Master Freight Agreement, these contracts provide that the parties are entitled to "all lawful economic recourse" in the event of a deadlock at

(Continued)

Therefore, given the fact that appeals to the next step in the Teamster grievance procedure are automatic, the only way the Union can abandon a grievance short of arbitration is to vote to "deny" the grievance.

Another difference between the two grievance models is that while *ex parte* contacts with arbitrators are forbidden,[4] such contacts between "interested" Teamster and employer officials and their counterparts on joint committees are the "expected norm" and have been defended as being "proper." *See Azoff, Joint Committees As An Alternative Form of Arbitration Under the NLRA*, 47 Tul. L. Rev. 325, 360-61 (1973); *Kirkland v. Arkansas-Best Freight System, Inc.*, 475 F. Supp. 180, 191 (E.D.Mo. 1979), *aff'd in relevant part*, 629 F.2d 538 (8th Cir. 1980), *cert. denied*, 450 U.S. 980 (1981). Thus, a local Teamster official may go through the motions of presenting an employee's grievance after communicating to the union committee representatives his belief that the grievance is without merit, or that it should be denied for other, totally irrelevant reasons.

However, neither Teamster representatives on joint committees, nor the committees themselves, customarily furnish grievants with any rationale for the union representative's vote to deny the grievance. These features of the prompted one defender of the joint committee grievance process to acknowledge that:

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3 (Continued)
that level. Those courts that have focused upon this feature of the grievance process have declined to accord "finality," by refusing to defer to joint committee decisions. *See Log Scalers v. Log Scaling Bureau*, 92 LRRM 3336 (D. Or. 1976); *Breish v. Ring Screw Works*, 397 Mich. 586, 248 N.W. 2d 526 (1976).

[4] *See* Rule 45, Labor Arbitration Rules, Am. Arbit. Ass'n.

> one inherent danger of the committee system is the ease with which it may be used as a tool for disciplining union members. The system is designed to maximize and exploit the opportunities for horsetrading and collusion between the employer and the union.

Azoff, *supra*, 47 Tul. L. Rev. at 336.[5] Once again, the critical factor for purposes of this proceeding is whether this Court will conclude that a denial of a Teamster's grievance by a joint committee should be treated for statute of limitations purposes as the equivalent of an impartial arbitral decision as that term was intended in *Mitchell*.

Another significant difference between the Teamster joint committee, and the traditional grievance-arbitration process, is that joint committees are not limited to hearing and resolving only those disputes arising under the contract. Rather, as in this case, the grievance procedure requires the parties to submit "any and all disputes" between the parties.[6] Although this feature of the joint committee process may be its virtue, it has prompted NLRB Board Member Howard Jenkins to observe:

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[5] *See also* Remarks of Robert Coulson, president of the Am. Arbitration Ass'n, 107 LRR 147 (June 2, 1981): "The joint grievance committee system of arbitration found in Teamster contracts is so clearly defective as an impartial mechanism that it is not surprising that we keep seeing it tested in the courts"; *I.H. Whitehouse & Sons v. Local Union 214*, 621 F.2d 294, 299 (8th Cir. 1980) (Teamster joint committee is "subject to grave abuses, including, notably, collusive secret agreements . . . as a result of which the interests of the individual employee grievants may be sacrificed . . .").

[6] *See* Agreement, Art. 7, sec. 11; J.A. 154 In contrast, an arbitrator's jurisdiction is limited to disputes arising under the contract, and arbitral decisions are legitimate only so long as they draw their essence from the contract. *United Steelworkers v. Enterprise Corp.*, *supra*, 363 U.S. at 597.

> Whatever result such a Committee of protagonists might reach, it is in part the product of economic power, adjustment with an eye on other disputes or differences between them or on their future bargaining positions, and other considerations unrelated to the merits of the particular claim before the Committee.

Terminal Transport Co., 185 NLRB 672, 675 (1970) (dissent).

Thus, the joint committee grievance process enables the Union and employers to engage in continuous negotiations to amend their agreements to meet unforeseen contingencies.[7] While desirable from the parties' viewpoint, from the individual grievant's point of view, the negotiation of his contract rights — where something must usually be relinguished to obtain a desired result — is a far cry from adjudication by an impartial arbitrator. For this additional reason, we submit that joint committee decisions to deny individual Teamster grievances are not analogous to impartial arbitral decisions covered by state arbitration statutes.

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[7] Justice Goldberg highlighted the distinction between the two grievance models in his concurring opinion in *Humphrey v. Moore*, 375 U.S. 335 (1964), where he observed that while the "labor contract is the touchstone of an arbitrator's powers," the joint committee enables the parties "to modify, amend, and supplement their original collective bargaining agreement . . . since '[t]he grievance procedure is . . . a part of the continuous collective bargaining process,' to settle grievances not falling within the scope of the contract." *Id.* at 353. Azoff has described the committee as "a mirror image of the collective bargaining relationship, . . . an institutionalized process of continual agreement, . . . an extension of the negotiating arms of the parties," Azoff, *supra*, 47 Tul. L. Rev. at 327, 347-48.

Different considerations apply, however, when an employer seeks to challenge a joint committee award. Accordingly, when an employer refused to comply with a committee award, claiming that the absence of a neutral party rendered it non-binding, this Court held in *General Drivers v. Riss & Co.*, 376 U.S. 517 (1963), that the employer could no more repudiate a contractual agreement to be bound by a joint committee decision than it could repudiate a commitment to be bound by a decision of an impartial arbitrator. As the Court subsequently explained, a joint committee award is "final and binding on the parties, just as the contract says it is." *Humphrey v. Moore*, 375 U.S. 335, 351 (1964).[8]

Although a number of courts have taken *Riss* a step further and automatically accorded all Teamster joint committee contract adjustments the same deference normally reserved for impartial arbitral decisions even when dealing with the rights of individual employees, we submit that they have erred in doing so.[9] The result has been to place this Court's "bulwark" against arbitrary union conduct beyond the reach of most Teamsters.

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[8] In *Hines v. Anchor Motor Freight, supra*, 424 U.S. at 565, the Court described a joint committee award as "a bargained for accommodation between the two parties." Although Teamster joint committee awards figured in both *Hines* and *Mitchell*, it was assumed in both cases that the awards would be accorded the same degree of finality normally accorded to decisions by impartial arbitrators. During the oral argument in *Mitchell*, Justice White did briefly question company counsel about the difference between joint committee, and arbitral, disposition of grievances. Tr. 5-6. The response was only that they both yield "final" decisions.

[9] *See, e.g., Morris v. Werner-Continental, Inc.*, 466 F.2d 1185 (6th Cir. 1972); *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167 (5th Cir. 1971).

The simple solution to this problem would be for this Court to recognize that while Teamster joint committee settlements may be just as "final and binding" upon the signatories to Teamster agreements, as arbitration awards are upon the parties to other collective bargaining agreements, from the employee's standpoint, a "denial" of his grievance by a joint committee represents no more than a decision by his union to abandon his grievance at an intermediate step of the grievance procedure, i.e., short of arbitration. Of course, that is precisely what occurred in this case where Philip Del Costello's grievance simply was not pressed by the Teamsters Union beyond what might be described as the first step of his formal grievance procedure after informal discussions had yielded no settlement. When viewed in this light, undistorted by the respondent's claims that Mr. Del Costello's grievance was resolved by an "arbitral tribunal," it follows that the Maryland statute of limitations for vacating impartial arbitration decisions is not appropriate because no such decision was rendered. Therefore, it was error for the court below to apply the holding in *Mitchell* in this case.

II. EXTENSION OF *MITCHELL* TO SUITS BY WORKERS AGAINST THEIR UNIONS FOR BREACH OF THE DUTY OF FAIR REPRESENTATION WILL UNDERMINE THE "BULWARK" AGAINST IMPROPER UNION CONDUCT

Pursuant to *Hoosier Cardinal*, the courts that examined the employee's cause of action against his union for breach of its duty of fair representation concluded that it was analogous either to a malpractice action (i.e., a tort), or to an action for violation of rights created by statute. Accordingly, as we have

seen *supra*, p.4, the courts applied the state statute of limitations for one of these causes of action to the employee's DFR action against his union. However, after the Court's decision in *Mitchell*, a number of courts, like the one below, instead applied to DFR actions the statute of limitations for suits to vacate arbitral awards.

Whatever may be said of an employee's cause of action against his union for breach of its duty of fair representation, it simply may not be said that it is analogous to an action to vacate an arbitral decision. It is only when the employee's action against his union is pursued in the same suit as an action against his employer that it may be linked to, but not converted into, an action to vacate an arbitral decision. Of course, where the employee's grievance was not pursued to arbitration, the employee's DFR action is not even linked to an action to vacate an arbitral award; instead, it is linked to an action for breach of contract. Accordingly, we submit that it is inappropriate to apply the statute of limitations for vacating arbitral decisions to employee DRF actions against their unions whether they are linked to, or independent of any section 301 action against an employer.

If employees are to be protected by the "bulwark against arbitrary union conduct" envisioned by the Court in *Vaca*, they must be afforded an opportunity first to recognize their right to obtain judicial review of arbitrary union conduct, and then to locate and retain a lawyer. Thereafter, the lawyer must be able to investigate the facts and evaluate the employee's claims against both his union and employer and, in appropriate cases, to initiate timely legal proceedings. Although employees previously were able to pursue

their rights, the Court's decision in *Mitchell* has fundamentally altered section 301 law and threatened to close the safety valve fashioned by the Court in *Vaca*.

In most commercial arbitration cases covered by state arbitration statutes, it is not unreasonable to assume that the parties will be able to initiate actions to vacate awards within a short period following their issuance. The parties are usually represented by legal counsel during the arbitration proceeding. Not only is the lawyer-client relationship already established, the lawyer is familiar both with the law and the facts and therefore able to counsel the client concerning the advisability of a judicial challenge, and initiate a timely legal action when appropriate.

In labor arbitration, however, the union functions as the worker's legal representative. Upon the conclusion of the proceeding, the union's responsibilities cease and it becomes a potential adversary which can hardly be expected to counsel the employee concerning his right to remedy a breach of its duty of fair representation. *See* Fox and Sonenthal, *supra*, 128 Pa. L. Rev. at 1031. The employee who may have been the victim of unlawful conduct by both his employer and union is suddenly high and dry. Although unions and employers often have relatively easy access to legal counsel, the worker does not. He must start from scratch to pursue his legal rights and he is ill-equipped to do so in just a few short days or weeks.[10]

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[10] These differences between commercial and labor arbitration may explain why a number of state arbitration statutes expressly exclude labor arbitration. *See, e.g., Badon v. General Motors, Inc.*, 679 F.2d 93, 98-99 (6th Cir. 1982) (Michigan); *McFarland v. Teamsters Local 745*, 535 F. Supp. 970 (N.D.Tex. 1982); *Engelsberg v. Transcon Freight Lines*, 530 F. Supp. 628 (D. Wash. 1982); Arizona Rev. Stat. Ann. § 12-1513; Arkansas

(Continued)

In *Hoosier Cardinal*, this Court suggested what it considered to be unduly long, and unreasonably short limitations periods for a "pure" section 301 suit by a union against an employer for alleged breach of contract.[11] The Court acknowledged that a union's section 301 suit against an employer "closely resembles an action for breach of contract cognizable at common law." 383 U.S. at 705 n. 7. However, the Court rejected Indiana's 20-year statute of limitations for written contracts in favor of its 6-year statute for oral contracts because "to the extent that a policy is manifest in the Labor Management Relations Act, it . . . suggests that relatively rapid disposition of labor disputes is a goal of federal labor law." *Id.* at 707. At the same time, the Court suggested that a 60-day statute of limitations would be unreasonably short. *Id.* at 707 n.9[12]

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10 (Continued)
Stat. Ann. § 34.522; Kansas Stat. Ann. § 5-412; Louisiana Stat. Ann. § 9:4215; Oklahoma Stat. Ann. § 812; Oregon Rev. Stat. § 33.310; General Laws of Rhode Island § 10-3-15. *See also* Maryland Code Ann. § 3-224 exempting labor arbitration unless otherwise provided by the parties in collective bargaining agreements.

[11] This action did not, of course, include a DFR claim usually found in a "hybrid" action brought by an employee.

[12] The statutes of limitation for vacating arbitration decisions range, for the most part, between 30 and 90 days. In some cases, they can be as short as only a few days. *E.g.*, Hawaii Rev. Stat. § 658.11 (10 days); Mich. Stat. Ann § 27A.5001, *et seq.*, Mich. General Court Rule 769 (20 days); Oregon Rev. Stat. § 33.310 (20 days); South Carolina Code § 15-47-40 (5 days); Alabama Code § 6-6-15 (10 days). *See also* those states whose arbitral statutes of limitation are tied to court terms: Ga. Code Ann. § 7-219; Kentucky Rev. Stat. § 417.017; Missouri Rev. Stat. § 435.120; Montana Code Ann. § 27-5-303; Neb. Rev. Stat. § 25-2114; Virginia Code Ann. § 8.01-579; West Virginia Code § 55-10-3.

Although the petitioner in this proceeding is arguing, together with the AFL-CIO, that the 6-month limitations period in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), should govern employee actions against unions for breach of the duty of fair representation implied in section 9 of that statute, we see problems with that approach despite its superficial appeal.[13] It is one thing for a worker to locate the closest office of the National Labor Relations Board and file charges with the NLRB against his union or employer within 6 months. To do so costs the employee nothing; he need only complete a simple, one-page form. The filing of charges is obviously a much simpler chore than the initiation of a section 301 legal action. Indeed, the filing of NLRB charges only precipitates an investigation which may eventually lead to the NLRB's filing an administrative complaint at some later time.[14] Thus, despite federal policy favoring relatively rapid disposition of labor disputes, an employer or union that may have violated the law is not off the hook after six months if charges have been filed with the NLRB.

Were the Court to accept the petitioner's position and hold that employee actions against either just their union, or against both their union and employer

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[13] Because Del Costello's suit was filed within the section 10(b) limitations period, it is understandable that he would urge acceptance of this statute of limitations.

[14] There is no subsequent time limit imposed upon the NLRB for issuing complaints. However, according to the NLRB Forty-Fifth Annual Report for the 1980 Fiscal Year, p. 294, Table 23, the median period of time elapsed between filing of charges and issuance of complaints is 46 days. The median time between the filing of charges and issuance of final Board decisions is 484 days. *Ibid.*

must actually be filed within 6 months, employees would have to initiate contact with a lawyer substantially before the 6-month period had elapsed. And, although many of their disputes may eventually be remedied by the NLRB, the employee's lawyer would have to file a "protective" complaint in United States district court before the Board had had a chance even to investigate the matter, much less initiate its own remedial action. In addition, the employee's lawyer may often be unable to familiarize himself with the employee's claims before having to initiate an action to meet the statute of limitations. The result will be to cause the unnecessary expenditure of resources for legal services by workers, and their companies and unions, not to mention, by the judiciary.

Thus, while the 6-month limitations period under section 10(b) might otherwise appear to be the most appropriate one to apply to employee actions against their unions for breach of duty of fair representation, a somewhat lengthier period would be preferable. Accordingly, we urge the Court to hold that such actions should be governed by the limitation period governing either torts, or actions arising under statute. Typically, these statutes of limitation are for either two or three years which is sufficient to permit workers to explore the possibility of obtaining relief from the NLRB, develop evidence, secure lawyers, and obtain relief where appropriate. Should the Court wish to do so, it could specify that the shorter of these limitations periods should be adopted to promote the federal labor policy which favors the relatively rapid disposition of labor controversies. Were the Court to adopt a significantly shorter statute of limitations, it would create procedural havoc and deprive employees of a

safety valve for obtaining relief both from their unions for breach of the duty of fair representation, and from their employers for breach of contract.

CONCLUSION

For the foregoing reasons, TDU respectfully submits that this Court should reverse and remand this case with appropriate instruction concerning the nature of suits by Teamsters to vacate joint committee awards, and the nature of the cause of action by employees against their unions for breach of the duty of fair representation.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP DEL COSTELLO,
Petitioner,
v.
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AS AMICUS CURIAE

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v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

This brief *amicus curiae* is filed by the International Brotherhood of Teamsters (IBT) in support of Respondent Local 557, Freight Drivers and Helpers, International Brotherhood of Teamsters, with the consent of all parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, which contemplates suits by employees, as well as suits by and against employers and labor organizations. *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962). Section 301 "reflects the interest of Congress in promoting 'a higher degree of responsibility upon the parties to [collective bargaining] agreements . . . .' S. Rep. No. 105, 80th Cong., 1st Sess. 17

(1947)." *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 561 (1976). Under § 301 an employee can maintain suit against his union for breach of the duty of fair representation, and against his employer for breach of contract, in a single action. *Hines* v. *Anchor Motor Freight*, *supra*, 424 U.S. 554; *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

The instant action is one envisioned by *Hines*. Brought against an employer and a union, this suit seeks to relitigate a claim of wrongful discharge previously decided adversely to the employee by an arbitral panel convened pursuant to the collective bargaining agreement's grievance arbitration procedure. Under that agreement, the arbitral decision was final and binding. But the suit alleges that, contrary to the arbitration decision, the discharge complained against was in violation of the contract, and that the union's failure to represent the employee fairly at the arbitration hearing contributed to the erroneous outcome.

The issues presented here relate to the appropriate statute of limitations to be applied to a hybrid § 301 breach of contract and fair representation action. Since § 301 contains no limitations provision, the timeliness of such suits is controlled, as a matter of federal law, by the most appropriate state statute of limitations. *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). In selecting the most appropriate state statute of limitations, a federal court must characterize the action. Only if that state law characterization is "unreasonable or otherwise inconsistent with national labor policy," should it be rejected. *UAW* v. *Hoosier Cardinal Corp.*, *supra*, 383 U.S. at 706. In the latter instance, the court may exercise a degree of "judicial inventiveness" in fashioning an appropriate federal standard. *Id.* at 701.

1. In *UPS* v. *Mitchell*, 451 U.S. 56 (1981), this Court determined that a *Hines* § 301 suit was closely analogous to a state action to vacate an arbitral award, and that borrowing New York's 90-day limitation for such suits

would further federal policy favoring the final and rapid disposition of labor disputes. State limitations on actions to vacate arbitral awards furnish an appropriate solution in *Hines* § 301 cases. These specific limitations provisions are closely analogous to the cause of action, and therefore are preferable to § 10(b), 29 U.S.C. § 160(b), a general limitations provision for unfair labor practices that Congress did not choose to apply to § 301 suits. Considering § 301's breadth and the many causes of action embraced within it, Congress' choice to leave the limitations governing such diverse actions to state law is strongly suggested by logic, as well as by decisional law extending as far back as 1830.

A *Hines* § 301 suit is more closely analogous to an action to vacate an arbitration award than to an unfair labor practice proceeding. The duty of fair representation was implied from the exclusive representation status granted unions by § 9 of the National Labor Relations Act, 29 U.S.C. § 159(a). It was enforced by suit in the federal courts for many years before the NLRB concluded that the duty's breach could also be remedied under § 8's unfair labor practice provisions. *Miranda Fuel*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). Admittedly, a § 301 unfair representation action "is more a creature of 'labor law' as it has developed since the enactment of § 301 . . . ." *UPS* v. *Mitchell*, *supra*, 451 U.S. at 63. Nevertheless, when the action is brought in a post-arbitration setting, and the threshold issue is whether the award will be upset, the state limitations statute enacted specifically for suits to vacate arbitral awards is more nearly analogous than any general limitations provision.

2. The rule of *Mitchell* applies both to the fair representation claims against unions and to the claims against employers. Characterization of the *Hines* action as one closely analogous to a suit to vacate an arbitral award aptly describes the claims against both parties. The issue common to both union and employer is whether the ar-

bitral award may be vacated because the union's conduct tainted the proceedings; necessarily, the claims against both parties call for common and interrelated elements of proof. Application of the relatively short state arbitration statutes for both claims also furthers federal policy interests calling for the speedy and final resolution of labor disputes by a method agreed upon by the parties. At the same time, the equal limitations rule will preserve an equal right to action against both employer and union. This is necessary to assure an adequate remedy for the employee and to allocate damages properly between the parties. *Vaca* v. *Sipes*, *supra*, 386 U.S. at 187, 197.

3. Section 10(b)'s six-month limitation should be applied to unfair representation claims against both employers and unions in (a) post-arbitration § 301 actions where the forum state has not enacted a limitations period governing suits to vacate arbitral awards and (b) § 301 actions where the merits of the plaintiff's contract claim have not been arbitrated. In both instances, the fair representation component of the action makes a contract characterization inappropriate. And, the states' multi-year limitations on contract, tort, and malpractice actions are too long to be consistent with federal policy. *UPS* v. *Mitchell*, *supra*, 451 U.S. at 62-63. Even where state statutes limiting actions to vacate arbitral awards are available, they are less analogous than § 10(b) when there is no award to vacate. Unlike the *Hines* case, the central issue in suits where there has been no arbitration more closely resembles the fair representation unfair labor practice. Less "judicial inventiveness" is called for in applying § 10(b) than in borrowing inapposite state characterizations.

4. The "final and binding" awards of joint labor-management committees are the equivalent of final and binding arbitral awards. *Drivers Union* v. *Riss*, 372 U.S. 517 (1963). Contrary to the argument advanced by *Amicus* Teamsters for a Democratic Union, a decision by the joint committee adverse to the grievant does not repre-

sent a discretionary choice by the union to abandon a grievance. Instead, an adverse joint panel decision forecloses any further action because it is final and binding on all parties. The union members on the joint committee are not from the same local union which presents the case, so they have nothing to gain or lose whether the case is finally decided or deadlocked. Accordingly, for limitations purposes, a suit to challenge a final and binding joint committee award is to be treated as an action to vacate an arbitral award.

ARGUMENT

I. THE TIMELINESS OF § 301 FAIR REPRESENTATION SUITS IS CONTROLLED BY THE MOST APPROPRIATE STATE STATUTE OF LIMITATIONS

A. The Traditional Rule Of Borrowing State Statutes

Congress has not enacted a statute of limitations governing § 301 actions. Addressing the question whether to create by judicial fiat a federal statute of limitations for § 301 claims, this Court, in *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703-05 (1966), affirmed the traditional rule that where a federal statute fails to specify a limitations period, the most clearly analogous statute of limitations of the forum state should govern if it conforms with the underlying policy of the federal statute. The Court thus rejected the argument that it devise a uniform time limitation to close the statutory gap left by Congress in § 301:

> "[T]he teaching of our cases does not require so bald a form of judicial innovation. Lincoln Mills instructs that, in fashioning federal law, the 'range of judicial inventiveness will be determined by the nature of the problem.' 353 U.S. at 457. We do not question that there are problems so vital to the implementation of federal labor policy that they will command a high degree of inventiveness from the courts. The problem presented here, however, is not of that nature." [383 U.S. at 701.]

Although the *Hoosier* Court acknowledged that application of state statutes of limitations will not establish a uniform standard of timeliness, it nonetheless concluded that lack of uniformity in limitations provisions was unlikely to affect significantly substantive rights in the collective bargaining process. It reasoned as follows:

> "The need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy . . . . [T]here is no justification for the drastic sort of judicial legislation that is urged upon us." [383 U.S. at 702-03 (footnote omitted).]

Since 1830 this Court has consistently borrowed the most analogous state statute of limitations where federal law does not specify a limitations period.[1] *Id.* at 703-04. Most recently in *UPS* v. *Mitchell*, 451 U.S. 56 (1981), the Court reaffirmed this general principle in a *Hines* § 301 fair representation suit identical in character to the instant matter, and held that state statutes for vacating arbitral awards should be applied.

Petitioner now argues, however, that *Mitchell* expressly left open the question whether a state limitations period should be borrowed, or whether federal courts should instead apply the six-month limitations period found in § 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b). In *Mitchell*, the American Federa-

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[1] *E.g.*, *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1975) and cases cited therein. *See also UAW* v. *Hoosier Cardinal*, *supra*, 383 U.S. at 704 and cases cited therein.

tion of Labor and Congress for Industrial Organizations filed an *amicus curiae* brief arguing that § 10(b) was the appropriate limitations period in hybrid § 301 fair representation cases. In its view, the *Hoosier* rule was not controlling as it involved a § 301 breach of contract action by a union against an employer, whereas actions brought by employees against both union and employer are hybrid actions, with the union's duty of fair representation being implied from the NLRA. The Court declined to consider this argument since it was not raised by either of the parties, noting that the issue before it was which state statute of limitations should be borrowed, and not whether such borrowing was appropriate. 451 U.S. at 60 n.2.[2]

At the outset, we disagree that the propriety of borrowing state statutes in post-arbitration § 301 cases was left open in *Mitchell*. The Court stated without any equivocation that, " 'the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations.' " 451 U.S. at 60, quoting *Hoosier Cardinal, supra*, 383 U.S. at 704-705.[3] Moreover, while Petitioner's § 10(b) argument,

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[2] In the wake of *Mitchell* the courts have reached varying conclusions in considering the § 10(b) argument. *Compare Flowers* v. *Steelworkers, Local 2602*, 671 F.2d 87 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 81-2408) and *Edwards* v. *Sea-Land Service Inc.*, 678 F.2d 1276 (5th Cir. 1982) (§ 10(b) rejected) with *Badon* v. *General Motors*, 679 F.2d 93 (6th Cir. 1982) (§ 10(b) used where state statute found inapplicable). *See also Hall* v. *Printing Union Local 3*, 112 L.R.R.M. 2151 (7th Cir. 1982) (§ 10(b) applied in case where no arbitral award was involved); *Davidson* v. *Roadway Express, Inc.*, 650 F.2d 902, 904 n.2 (7th Cir. 1981) (§ 10(b) issue questioned but not decided). The district courts have also reached contrary conclusions. *See*, Pet. for Cert., *United Steelworkers* v. *Flowers* (No. 81-2408), at 9 and n.3.

[3] In contrast, the separate concurring opinion of Justice Blackmun reflects his preference for the § 10(b) argument, but states that its resolution should await the development of a full adversarial record. 451 U.S. at 65.

echoing that made by the AFL-CIO in *Mitchell*,[4] has some appeal, it is not as compelling as its adherents describe it. Nor does it warrant a departure from the preferred traditional approach of borrowing the most appropriate state statute of limitations. This is not to say that § 10(b) has no utility in some situations. See, *infra*, pp. 18-24. But where the state statute provides a reasonable solution, consistent with national labor policy, it should be borrowed. *UAW* v. *Hoosier Cardinal Corp.*, *supra*, 383 U.S. at 706.

As the Seventh Circuit Court of Appeals in *Stevens* v. *Gateway Transportation Co.*, 112 L.R.R.M. 2177, 2179 (1982), stated in following *Mitchell*:

> "Federal courts look to state law in fashioning appropriate limitations periods for suits like plaintiffs' not because principles of federalism require it, but because the 'range of judicial inventiveness' in such matters is not, and should not be, unlimited. [Hoosier Cardinal, 383 U.S.] at 701, quoting *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448. That range extends only so far as national interests require, and if state law is consonant with those interests and lack of uniformity in federal law would not threaten them, there is no need for a federal court to do more than adopt state law."

B. Resort To § 10(b) Is Neither Necessary Nor Desirable In Post-Arbitration § 301 Suits

The § 10(b) argument is not flawed simply because it would require departure from an established rule; its substance is faulty when applied to post-arbitration § 301 cases. According to the argument, a hybrid § 301 case involves allegations that the union breached its duty of fair representation—conduct that may also constitute an unfair labor practice. Since § 10(b) reflects Congress'

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[4] This argument is also made by Petitioner in *United Steelworkers of America* v. *Flowers*, *cert. granted*, 51 U.S.L.W. 3419 (U.S. Nov. 29, 1982) (No. 81-2408).

judgment as to the appropriate limitations period for unfair labor practices, it is the clearest indication of its intent as to "when claims of a very similar or identical character must be brought." *UPS* v. *Mitchell*, 451 U.S. at 67-68 n.3 (Stewart, J. concurring).

The duty of fair representation is not expressly set forth in the federal labor statutes. It was first implied from Congress' grant of exclusive representation status to unions certified under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, in a series of cases involving racial discrimination. *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944). Later, the fair representation duty was extended to unions certified under § 9(a) of the NLRA, 29 U.S.C. 159(a), as the exclusive bargaining representative selected by a majority of employees in an appropriate bargaining unit. *Syres* v. *Oil Workers*, 350 U.S. 892 (1955). *See also Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). Not until 1962 did the NLRB conclude that breach of a union's duty of fair representation constitutes an unfair labor practice prohibited by § 8(b)(1)(A) of the NLRA, 29 U.S.C. § 158(b)(1)(A), even though § 8(b), proscribing union unfair labor practices, had been enacted in 1947. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

Thus, the duty of fair representation derives from the union's exclusive representation status granted by § 9 of the NLRA rather than from the unfair labor practice provisions in § 8 of the Act.[5] Section 10(b), enacted in 1947, is "directed solely to the administrative procedure established by Congress in the National Labor Relations Act for the resolution of unfair labor practice charges arising under, and processed in accordance with, that

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[5] *Syres* v. *Oil Workers*, *supra*, 350 U.S. 892; *Humphrey* v. *Moore*, 375 U.S. 335, 351-359 (Goldberg, J., concurring). *But cf. Ford Motor Co.* v. *Huffman*, *supra*, 345 U.S. 330; *Wallace Corp.* v. *NLRB*, 323 U.S. 248 (1944).

Act . . . ." *UPS* v. *Mitchell*, *supra*, 451 U.S. at 75 n.8 (Stevens, J. concurring in part and dissenting in part).

Moreover, § 10(b) was enacted before this Court recognized the duty of fair representation implied from § 9(a), and long before a breach of that duty was held to be an unfair labor practice. *Miranda Fuel*, *supra*, 140 N.L.R.B. 181. The fair representation doctrine was well developed by the federal judiciary before the NLRB adopted it. And, the concepts adopted by the NLRB were those developed by the federal courts. Thus, historically, enforcement of the duty of fair representation does not focus singly, or even primarily, on the NLRB.[6] It would be "strain[ing] to conclude that Congress intended that § 10(b) . . . be applied to causes of action that this Court had not yet divined when § 10(b) was enacted . . . ." *UPS* v. *Mitchell*, 451 U.S. at 75-76 (Stevens, J., concurring and dissenting) (citation and footnote omitted).

Petitioner also argues that the *Hoosier* rule should not be used where a federal cause of action is implied from legislation and not expressly created by Congress, reasoning that congressional intent to apply state limitations to implied causes of action cannot be assumed. Yet the rationale underlying this assertion is weak. Section 301 was enacted in the broadest possible terms; it created federal jurisdiction over "suits for violation of contracts

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[6] This consideration led the Court in *Vaca* v. *Sipes*, *supra*, 386 U.S. at 183, to conclude that duty of fair representation claims were not preempted by the NLRB, and that Congress did not intend "to oust the courts of their *traditional jurisdiction* to curb arbitrary conduct by the individual employee's statutory representative" (emphasis added). With the decision that the NLRB did not have exclusive jurisdiction over fair representation claims, there was an implicit recognition that there would be no centralized administration of these claims. A multiplicity of tribunals with a diversity of local procedures necessarily would be involved. *Cf. Garner* v. *Teamsters Union*, 346 U.S. 485, 490-91 (1953). Thus, *Vaca* left the federal courts free to exercise their "traditional jurisdiction" in fair representation suits. An element of this traditional jurisdiction is the borrowing principle discussed above.

between an employer and a labor organization . . . ." 29 U.S.C. § 185. A wide variety of actions are embraced within § 301,[7] including suits by employees (*Smith* v. *Evening News Ass'n, supra*, 371 U.S. 195), and various causes of action not previously known at law.[8] Rather than establish a single limitations period for all causes of action embraced by § 301, Congress left the limitations issue to state law in accordance with traditional principles.

Considering the breadth of § 301, the distinction between a right of action implied from legislation and one expressly created by Congress does not warrant a departure from the traditional rule of *Hoosier*.[9] There is at least a reasonable likelihood that Congress, anticipating a wide variety of actions under § 301, intended appropriate state limitations to apply to each. Far less likely is the possibility that Congress, in circumstances where appropriate state limitations are available for use, envisioned the application of federal limitations periods to § 301 cases. No authority sanctioned the latter approach in 1947, when § 301 was enacted, and it remains an unprecedented idea today.

As long as an appropriate state statute conforming with federal labor policy is available, it should be bor-

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[7] "[I]t is far too late in the day to deny that Congress intended the federal courts to enjoy wide-ranging authority to enforce labor contracts under § 301." *United Association* v. *Plumbers Local 334*, 452 U.S. 615, 627 (1981).

[8] *E.g., Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 467 (1957) (Congress, in § 301, rejected the common-law rule against enforcement of executory agreements to arbitrate).

[9] *See, e.g., Abrams* v. *Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971). *McAllister* v. *Magnolia Petroleum*, 357 U.S. 221 (1958) (Brennan, J., concurring), supplies no support for Petitioner's proposition that the Court has applied federal statutes of limitations to other judicially implied causes of action. As this Court itself specifically stated in *Hoosier*, that "case represents no departure from the tradition discussed in the text." 383 U.S. at 704 n.6.

rowed. *Mitchell* has already addressed that question. The problem presented here, therefore, simply does not call for the "drastic" degree of "judicial inventiveness" sought by the § 10(b) advocates. *UAW* v. *Hoosier Cardinal Corp., supra*, 383 U.S. at 701, 703.

> "That Congress did not provide a uniform limitations provision for § 301 suits is not an argument for judicially creating one, unless we ignore the context of this legislative omission. It is clear that Congress gave attention to limitations problems in the Labor Management Relations Act, 1947; it enacted a six months' provision to govern unfair labor practice proceedings . . . and it did so only after appreciable controversy. In this context, and against the background of the relationship between Congress and the courts on the question of limitations provisions, it cannot be fairly inferred that when Congress left § 301 without a uniform time limitation, it did so in the expectation that the courts would invent one." [383 U.S. at 703 (footnote omitted).]

In the absence of a definite need, as considered in Part III of this Argument, *infra* at pp. 18 to 24, it is far preferable for the federal courts to borrow an appropriate state statute of limitations than to create a general limitations period for unfair representation cases attacking final and binding arbitration awards. By their very nature, "time limitations are inevitably arbitrary to some extent . . . ." *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818 (1980). Legislatures are necessarily better equipped to balance the various competing interests and strike an appropriate balance than is a single district judge. Where, as here, the state legislature has specifically established a limitations period for actions to vacate arbitral awards, the collective judgment of its members warrants deference by the federal courts. To say that § 10(b) is also a legislative product is no answer, for Congress never considered the applicability of that limitation to suits challenging the finality of arbitral awards.

II. STATE STATUTES LIMITING ACTIONS TO VACATE ARBITRAL AWARDS SHOULD BE APPLIED TO CLAIMS AGAINST UNIONS AND EMPLOYERS IN POST-ARBITRATION § 301 FAIR REPRESENTATION SUITS

Given that the timeliness of post-arbitration § 301 fair representation suits should be governed, as a matter of federal law, by the most appropriate state statute of limitations, a federal court must then determine which limitation is "the most appropriate one provided by state law." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1975). "This depends upon an examination of the nature of the federal claim and the federal policies involved." *UPS* v. *Mitchell*, *supra*, 451 U.S. at 60-61. This Court in *Mitchell* characterized the post-arbitration hybrid § 301 action envisioned by *Hines* as one most analogous to an action to vacate an arbitration award, and found that New York's 90-day statute for such actions furthered federal policy by encouraging a rapid disposition of labor disputes. *Id.* at 64.

An issue that has divided the courts is whether the *Mitchell* characterization applies equally to causes of action against unions, or whether it applies only to those against employers. This question has arisen because only United Parcel Service, the employer in *Mitchell*, petitioned for certiorari. The union did not appeal from the Second Circuit's decision, although it did file a brief to this Court in support of UPS's position. The court below properly concluded that, "[a]lthough only the employer was before the Court, it is reasonably clear from the Supreme Court's opinion that the short limitations period would apply to a companion action against a union for breach of the duty of fair representation." *Del Costello* v. *Teamsters*, 524 F. Supp. 721, 722, (D. Md., 1981), *aff'd*, 679 F.2d 879 (4th Cir 1982) (unpublished decision).[10]

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[10] *Accord Singer* v. *Flying Tiger Line Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981) (*Mitchell* means "that a suit against a union and

A close reading of *Mitchell* compels the conclusion that it applies to both parties. Indeed, Justice Stevens felt obliged to file a separate opinion, dissenting insofar as the majority did not expressly limit its holding to employers. According to Justice Stevens, it would be "understandable" to interpret the Court's opinion as applying to both union and employer, although he disagreed with that result. *Id.* at 72. Having Justice Stevens' opinion before it, the majority still did not limit the applicability of its decision to the claim against the employer.[11] To read *Mitchell* as limited solely to employers would give effect to the dissent rather than to the majority opinion.

The *Mitchell* characterization analysis is equally applicable to claims against both parties. The threshold issue of the entire action is whether an otherwise "final and binding" arbitral decision may be attacked because of the union's failure to represent the plaintiff fairly at

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employer following an arbitration award could best be characterized as a suit to vacate the arbitration award . . . . [W]e shall treat suits against a union for a breach of the duty of fair representation and against an employer for a breach of a collective bargaining agreement under this type of limitations statute."); *Badon* v. *General Motors, supra*, 679 F.2d at 98 ("[W]e feel the better rule applies the same statute of limitations to both parties."); *Rigby* v. *Roadway Express, Inc.*, 680 F.2d 342 (5th Cir. 1982) (same rule applied without discussion); *Fedor* v. *Hygrade Food Products Corp.*, 687 F.2d 8 (3d Cir. 1982). *Contra Flowers* v. *Steelworkers, supra*, 671 F.2d 87; *Hand* v. *International Chemical Workers Union*, 681 F.2d 1308 (11th Cir. 1982); *Edwards* v. *Sea-Land Service Inc., supra*, 678 F.2d 1276. *See also Sear* v. *Cadillac Automobile Co.*, 654 F.2d 4, 6-7 (1st Cir. 1981); *Hall* v. *Printing Union Local 3, supra*, 112 L.R.R.M. at 2151 n.7.

[11] The Second Circuit Court of Appeals, in *Flowers* v. *Steelworkers, Local 2602, supra*, 671 F.2d 87, was particularly troubled by this consideration, although after "struggl[ing] with this difficult question," it held that arbitration award statutes of limitations do not apply to union claims. *Id.* at 90.

the arbitration proceeding. In other words, may the award be vacated? *Mitchell* affirms that the elements of the claim against an employer are the same as the elements of such a claim against a union:

> "[T]o prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. . . ." [451 U.S. at 62, quoting *Hines*, *supra*, 424 U.S. at 570-71.]

The Court rejected the breach of contract characterization of the action sought by the plaintiff because of the fair representation component. Because of this aspect, the shorter time limit on actions to vacate arbitral awards was warranted. In other words, the employer gained the advantage of the shorter time limitation (90 days as opposed to the six-year limit on contract actions) because proof of the union's breach of duty was a necessary element of the claim against the employer.

> "Since the conclusion of the Joint Panel was, under the collective-bargaining agreement, 'binding on all parties,' respondent was required in some way to show that the Union's duty to represent him fairly at the arbitration had been breached before he was entitled to reach the merits of his contract claim. This, in our view, makes the suit more analogous to an action to vacate an arbitration award than to a straight contract action.
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> "We think that the unfair representation claim made by an employee against his union, even though his employer may ultimately be called upon to respond in damages for it if he is successful, is more a creature of 'labor law' as it has developed since the enactment of § 301 than it is of general contract law." [451 U.S. at 62-63 (footnote omitted).]

It is thus apparent that the *Mitchell* court viewed the combined claims against union and employer as most

closely analogous to an action to vacate an arbitral award. This reasoning is sound.[12]

The union's duty of fair representation and the employer's contractual obligations, both enforceable in § 301 actions, are inextricably tied together in the *Hines*-type action.[13] Both claims stem from the alleged unauthorized discharge contrary to the contract, inasmuch as the claim against the union focuses on an alleged failure to represent the employee fairly in enforcing contractual rights.

Also, both claims call for interrelated proof. To prevail against the employer, the plaintiff must "prove that the union as bargaining agent breached its duty . . . in its handling of the employee's grievance." *Vaca* v. *Sipes*, *supra*, 386 U.S. at 186. "[S]imilarly, to prevail against the union, the employee must prove that the union breached its duty of fair representation and, if he wishes to recover loss of employment damages for which the union is responsible, that the employer breached the agreement." *UPS* v. *Mitchell*, *supra*, 451 U.S. at 73 n.2. (Stevens J., concurring and dissenting). *See also Bowen* v. *Postal Workers*, 51 U.S.L.W. 4051 (U.S. Jan. 11, 1983).

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[12] The Court similarly characterized an earlier fair representation case. In *Humphrey* v. *Moore*, *supra*, 375 U.S. 335, a group of employees who lost their jobs as a result of the merger of two operations alleged that the contract's seniority provision had been violated. They also claimed that the union had unfairly represented them before a joint grievance committee which had decided to dovetail the seniority list of the two merging companies. The Court stated, "the allegations of the complaint, if proved, would effectively undermine the decision of the Joint Committee as a valid basis for Moore's discharge. For these reasons this action is one arising under § 301 of the Labor Management Relations Act. . . ." *Id.* at 343-44 (footnote omitted).

[13] The availability of § 301 as an enforcement mechanism against employer and union "reflects the interests of Congress in promoting 'a higher degree of responsibility upon the parties to [labor] agreements . . . .'" *Hines* v. *Anchor Motor Freight, Inc.*, *supra*, 424 U.S. at 561.

Logically, both elements of the hybrid action should be subject to identical time constraints. No prejudice results since, under *Mitchell*, the employee is already under an obligation to file his action promptly.[14]

Characterization of both claims in the *Hines* hybrid § 301 case as an action to vacate the arbitral award also effectuates federal labor policy. "[T]he undesirability of the results of the grievance and arbitral process being suspended in limbo for long periods," as addressed by *Mitchell* (451 U.S. at 64), is significant for both unions and employers. Congress has declared as a paramount federal policy the promotion of industrial peace through the *quick* and *final* adjustment of labor disputes by a method agreed upon by the parties. The key to realization of that policy is grievance arbitration. "This system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question . . . years later." *Id.* at 64. A detrimental impact on the system remains likely so long as a § 301 unfair representation action can be maintained against either the union or the employer. Accordingly, the employee's claims against both union and employer should be governed by the same statute of limitations.

The Court has also recognized the importance of making employers and unions equally subject to suit in order to assure an appropriate remedy for the employee and to

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[14] The court below properly recognized these considerations: "Joint presentation and trial of the two claims is virtually compelled by the nature of the concomitant actions against the employer and union in § 301 cases. Plaintiff must now bring suit against the employer within the period of time for vacating the arbitration award in any event and is not substantially burdened by having to sue the union at the same time." *Del Costello* v. *Teamsters, supra*, 524 F. Supp. at 725.

allocate damages properly. If the employer were not subject to suit, for example, the employee could not obtain reinstatement to his job. Also, "[i]t could be a real hardship on the union to pay these damages, even if the union were given a right of indemnification against the employer. With the employee assured of direct recovery from the employer, we see no merit in requiring the union to pay the employer's share of the damages." *Vaca* v. *Sipes*, *supra*, 386 U.S. at 197 (footnote omitted). For a court to grant full relief, both parties must be before it. Since the plaintiff must prove the wrongdoing by both parties, if he is to prevail, there is little to commend "a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to" one of those parties. *Id.* at 187.

These principles highlight the need to apply equal limitations periods to suits against unions and employers. Since *Mitchell* has already decided that state statutes for vacating arbitral awards should be borrowed in post-arbitration § 301 cases, then the limitations established by those statutes should guide claims against both unions and employers.[15]

III. WHERE THE FORUM STATE HAS NO STATUTE OF LIMITATIONS CLOSELY ANALOGOUS TO THE § 301 ACTION OR CONSISTENT WITH UNDERLYING FEDERAL POLICIES, THEN THE COURTS SHOULD APPLY § 10(b) OF THE NLRA

As shown, *Hines* § 301 actions against employers and unions are best characterized as actions to vacate arbitral awards. The application of state statutes to such actions conforms with and furthers the national labor policies at stake. It permits expression of the policy favoring fair

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[15] If this Court departs from *Mitchell* and decides that § 10(b) is the appropriate limitation for post-arbitration § 301 actions, it should make clear that its holding applies to claims against both employer and union. Petitioner herein is in agreement that equal time limits should be established (Pet. Brief, at 27-28).

union representation, but equitably accommodates that policy to an equally important objective, that is, the promotion of labor peace through the final adjustment of disputes by a method agreed upon by the parties and the "relatively rapid disposition of labor disputes." *UPS* v. *Mitchell*, *supra*, 451 U.S. at 63. Yet some states have not enacted limitations periods governing actions to vacate arbitration awards, and not all fair representation actions under § 301 feature a final and binding grievance resolution. We examine these situations in turn, and urge that the six-month limitations period set forth in § 10(b) should be applied in each instance.

A. Post-Arbitration § 301 Actions; No Suitable State Limitation Available

Eight states[16] have no limitations statutes for actions to vacate arbitral awards. *Mitchell* has already rejected as not closely analogous various suggested state characterizations, *e.g.*, contract, tort, malpractice,[17] and they become no more acceptable in the absence of a statute for vacating arbitral awards. They are neither closely analogous to the § 301 post-arbitration action nor consistent with the policy underlying the federal cause of action, especially the policy favoring the rapid disposition of labor disputes. In cases arising in these states, it will thus be incumbent upon the courts judicially to devise an appropriate standard.

This approach does not conflict with the traditional rule discussed above. While the courts should, in the first instance, look to the state law characterization, that characterization must be rejected if it is "unreasonable or otherwise inconsistent with national labor policy." *UAW* v. *Hoosier Cardinal Corp.*, *supra*, 383 U.S. at 706.

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[16] *UPS* v. *Mitchell*, *supra*, 451 U.S. at 62 n.4.

[17] "All of these characterizations suffer from the same flaw . . . .: they overlook the fact that an arbitration award stands between the employee and any relief which may be awarded against the company." *UPS* v. *Mitchell*, *supra*, 451 U.S. at 62 n.4.

As this Court stated in *Johnson* v. *Railway Express Agency, supra*, 421 U.S. at 465:

> "Although state law is our primary guide in this area, it is not, to be sure our exclusive guide. As the court noted in *Auto Workers* v. *Hoosier Corp.* . . . considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration."

Then, in *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367 (1977), it noted:

> "But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies . . . . State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." [Citations omitted.]

In these instances, we would agree that § 10(b)'s six-month limit for unfair labor practices furnishes an appropriate standard for actions against employers and unions. The unfair labor practice resembles the cause of action at hand, and § 10(b) comports with federal policy favoring speedy resolution of these disputes. Its relevance to the hybrid § 301 fair representation action is well argued by the Petitioner in this case and in *United Steelworkers of America* v. *Flowers, supra, cert. granted*, No. 81-2408, and need not be reargued here.

B. Fair Representation Cases In Which No Final And Binding Arbitral Award Has Been Rendered

Application of § 10(b) is also appropriate in § 301 actions against employers *and* unions where, unlike *Mitchell* or this case, the grievance has not been submitted to a final and binding resolution. The characteriza-

tion of these cases has divided the Circuits. Prior to *Mitchell*, some identified them as breach of contract actions, while others viewed them as tort actions. *See, e.g., Butler* v. *Local 823, International Brotherhood of Teamsters*, 514 F.2d 442, 447 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975); *Abrams* v. *Carrier Corp., supra*, 434 F.2d at 1251-53. As shown below, a different characterization is now required.

In light of *Mitchell*, the contract characterization is not "closely analogous" to the hybrid § 301 action, whether or not an arbitration has taken place. Thus, the breach of contract characterization "ignores the significance of the fact that [the action] was brought in the District Court pursuant to § 301(a) of the LMRA and that the indispensable predicate for such an action is . . . a demonstration that the union breached its duty of fair representation." *UPS* v. *Mitchell, supra*, 451 U.S. at 62.[18] And, "the unfair representation claim . . . is more a creature of 'labor law' as it has developed since the enactment of § 301 then it is of general contract law." *Id.* at 63.

Moreover, "a collective bargaining agreement 'is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.' . . . In defining the relationships created by such an agreement, the Court has applied an evolving federal common law grounded in national labor policy." *Bowen* v. *Postal Workers, supra*, 51 U.S.L.W. at 4054. Since "one of the leading federal policies in this area is the 'relatively rapid disposition of labor disputes'" (*UPS* v. *Mitchell, supra*, 451 U.S. at 63), the multi-year limitations of the states relating to contract, tort and malpractice actions are too long to be applied consistently with federal policy.

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[18] This is true whether the grievance was submitted to arbitration (*Hines* v. *Anchor Motor Freight, supra*, 424 U.S. 554), or not (*Vaca* v. *Sipes, supra*, 386 U.S. 171).

The importance of resolving labor disputes quickly pertains whether or not the grievance has been pursued all the way through arbitration. For the entire grievance machinery is "at the very heart of the system of industrial self-government . . . . The processing machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *UPS* v. *Mitchell, supra*, 451 U.S. at 63-64. Thus, the policy interests which inform the selection of an appropriate limitations period are essentially the same in both post-arbitration cases alleging unfair representation and those where arbitration has not occurred.

> "The deterioration of evidence over time is the same regardless of arbitration and the importance to an employer of being able to rely upon a settlement reached after negotiation with a union is no less than the importance of being able to rely upon a settlement reached after arbitration. In both cases, the employer needs to know how many employees it is carrying on its payroll so that it may plan its operations accordingly. . . . Limitation rules should not promote costly and time-consuming adjudicative processes, especially in the field of labor relations where federal policy strongly favors 'the relatively rapid disposition of labor disputes.'" [*Hall* v. *Printing Union, Local 3*, 112 L.R.R.M. 2151, 2154 (7th Cir. 1982) (citations omitted).]

Obviously, the foregoing considerations weigh heavily against application of state statutes of limitations governing contract, tort or malpractice claims to § 301 fair representation cases when arbitration has not occurred. But they furnish no basis for selecting between § 10(b) and state statutes for vacating arbitral awards as the appropriate limitation for a § 301 case in which the plaintiff's rights have not been arbitrated.

The Sixth and Seventh Circuit Courts of Appeal have concluded that state statutes governing the vacation of

arbitration decisions are equally applicable to § 301 fair representation cases, whether or not an award has issued. *Hall* v. *Printing Union, Local 3, supra*, 112 L.R.R.M. at 2153; *Badon* v. *General Motors Corp., supra*, 679 F.2d at 98. In *Hall*, a state three-month limitation was applied to the claim against the employer, while § 10(b) was held applicable to the claim against the union. *Badon* made clear that the same limitation applied to all claims asserted against both parties. With deference, we submit that a statute limiting the period within which an arbitral award can be attacked is less analogous than § 10(b) in circumstances where no award has been rendered. Consequently, the latter limitation should govern unfair representation claims against both unions and employers. *See Lewis* v. *Harbison-Walker Refractories*, 112 L.R.R.M. 2242, 2244 (N.D. Ind. 1982).

In *Mitchell*, this Court characterized *Hines* § 301 suits as ones to vacate arbitration awards because in view of the finality of such awards, the plaintiff is required "to show that the Union's duty to represent him fairly at the arbitration ha[s] been breached before he . . . [is] entitled to reach the merits of his contract claim." 451 U.S. at 62. Where no arbitration award has been rendered, of course, there is nothing to vacate. The fairness and regularity of the arbitration procedure will not be in issue. Accordingly, the gravamen of such an unfair representation suit is more closely analogous to an unfair labor practice proceeding, to which § 10(b) is applicable, than to an action to vacate an arbitral award.

Less "judicial inventiveness" is called for in applying § 10(b) to an § 301 action in which arbitration has not occurred than in seizing upon a state statute that, by its terms, is inapposite in light of the action's subject matter. There can be no pretense that state legislatures, in enacting limitations periods for actions to vacate arbitration awards, considered the same limitations suitable for cases in which no award has issued. In short,

there is little reason to borrow state limitations periods for § 301 unfair representation cases unless the plaintiff's rights have been arbitrated.

IV. FINAL AND BINDING DECISIONS BY BIPARTISAN GRIEVANCE COMMITTEES ARE THE EQUIVALENT OF ARBITRAL AWARDS

Advancing an argument not made by any party to this case here or in courts below,[10] Teamsters For A Democratic Union (TDU) urges in its *amicus* brief that a decision by a joint labor-management grievance committee is not the equivalent of an award by an impartial arbitrator. Therefore, it is argued, a *Hines* § 301 action challenging a joint committee decision should not be governed by state limitations periods for suits to vacate arbitral awards found applicable by this Court in *Mitchell*. This argument is based on faulty analysis and finds no support in law.

The National Master Automobile Transporters Agreement, to which Anchor and Local 557 are signatory, establishes a four-step grievance procedure. The first step calls for settlement attempts at the local level. Failing resolution at the local level, the local union or the employer may present the grievance to a panel of the Eastern Conference Joint Arbitration Committee for decision. Each panel is composed of equal numbers of labor and management representatives, none of whom can be officials of the local union or employer involved in the grievance dispute. A majority vote of the panel is final and binding on both parties. If, however, the grievance is deadlocked by the panel, it proceeds automatically to the National Joint Arbitration Committee, also composed of labor and management representatives in equal numbers, for final decision by majority vote. Grievances deadlocked by the National Committee are referred to a tri-

[10] The argument should not be considered by the Court. *UPS* v. *Mitchell*, *supra*, 451 U.S. at 60 n.2.

partite board of arbitration, consisting of three members representing labor, management and the public. The Petitioner's grievance in this case was heard by the Eastern Conference Joint Arbitration Committee and rejected by majority vote.

Final and binding decisions by joint committees have been treated uniformly as the equivalent of arbitral awards by this Court and all lower courts. In *Drivers Union* v. *Riss & Co.*, 372 U.S. 517 (1963), where the federal policy of judicial deference to arbitrator's awards was held equally applicable to the awards of joint or bipartisan committees, this Court reasoned:

> "It is not enough that the word 'arbitration' does not appear in the collective bargaining agreement, for we have held that the policy of the Labor Act 'can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' . . . . Thus, if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement, it is enforceable under § 301." [*Id.* at 519 (citations omitted).]

Similarly, in *Humphrey* v. *Moore*, *supra*, 375 U.S. at 351, the Court stated: "The decision of the committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is." [20]

The Court also has made clear that the bar of the finality provision contained in the Car-Haul Agreement at issue here is not to be lightly removed, since it "has sufficient force to surmount occasional instances of mistake" or "mere errors in judgment." *Hines* v. *Anchor*

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[20] *See also Chicago Cartage Co.* v. *Teamsters Local 710*, 659 F.2d 825, 827 (7th Cir. 1981); *Teamsters Local 30* v. *Helms Express, Inc.*, 591 F.2d 211, 216 (3d Cir.), *cert. denied*, 444 U.S. 837 (1979); *Early* v. *Eastern Transfer*, No. 82-1217 (1st Cir. Feb. 1, 1983), slip op. at 5.

Motor Freight, supra, 424 U.S. at 571. Central to the *Hines* analysis is the premise that, absent proof of dishonest, bad-faith or discriminatory union conduct, adverse grievance decisions are final and binding.[21] The bipartisan composition of the Teamster grievance committee in *Hines* in no way detracted from the finality to which the award was entitled under the agreement. Final and binding joint committee decisions are due the same deference as nonpartisan arbitral awards, whether challenged by a party to the agreement (*e.g.*, *Drivers Union* v. *Riss, supra*, 372 U.S. 517), or by an individual (e.g., *Hines*; *Humphrey* v. *Moore, supra*, 375 U.S. 335).

If joint committee and arbitral awards are viewed as final and binding for the purpose of establishing individual substantive rights, then, *a fortiori*, they are to be regarded as final for purposes of determining the statute of limitations governing the individual's right of action. Indeed, *Mitchell* has already disposed of this issue, finding that a suit to vacate a Teamster joint grievance committee's decision would be limited by the state statute on actions to vacate arbitral awards, and rejecting the tort or "action upon a statute" characterization now urged by *Amicus* TDU.

Very recently, the Fifth Circuit Court of Appeals squarely faced the issue raised by TDU and summarily rejected the argument that the Mississippi statute for actions to vacate arbitral awards was not applicable:

> "Rigby also asserts that the peculiar make-up of the universal Teamsters Collective Bargaining Agreement Grievance Panels keeps the decision from being those contemplated as arbitration by the law. This

[21] A right of action for unfair representation is available to grievants whose cases have been decided adversely by a joint committee, no less than to those who have lost before an impartial arbitrator. Thus, the statement that "this Court's 'bulwark' against arbitrary union conduct [is] beyond the reach of most Teamsters" (TDU Brief, at 12), is utter nonsense.

> contention is also novel and without legal support. The Teamsters grievance panel is bipartisan, rather than tripartite or nonpartisan as is more common in the tribunals established by collective bargaining agreements. Nevertheless, the Teamsters arbitration panel has been in use for many years and is well recognized as a proper form of arbitration panel for the resolution of grievances under the obligation to arbitrate contained in federal law. [*Rigby* v. *Roadway Express, Inc., supra*, 680 F.2d at 344.] [22]

As shown, uniform decisional law establishes that, if a grievance award is final and binding under the contract, then it is to be treated as such whether the award is rendered by a bipartite committee, a tripartite tribunal, or a single arbitrator. TDU attempts to circumvent this finality principle by arguing that, since a joint committee award adverse to the grievant only results when one or more of the labor members votes against the grievant, such an award is in reality equivalent to a union decision to abandon the grievance short of arbitration. This argument ignores the realities of the grievance machinery.

The grievant's exclusive bargaining representative, upon submitting his grievance to the joint committee for decision, can abandon the grievance only by withdrawing it. If the grievance is lost by majority vote of the hearing panel, it cannot be pursued further by the local union representing the grievant. E.g., *Harris* v. *Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 172 (5th Cir. 1971). No discretion is involved, inasmuch as the decision is final and binding on all parties. Nor does the fact that one or more labor members voted against the grievant evidence a discretionary choice by the grievant's local union

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[22] *See also Davidson* v. *Roadway Express, Inc., supra*, 650 F.2d at 904 n.1; *Singer* v. *The Flying Tiger Line Inc., supra*, 652 F.2d 1349 (suit to challenge award of bipartisan Railway Labor Act System Board governed by statute on actions to vacate arbitral awards).

to abandon his grievance. The panel's labor members are not officials or representatives of the local union having responsibility for representing the grievant, but rather of other local unions signatory to the agreement. As such, they have little to gain or lose whether the grievance is decided or deadlocked.

Under this Court's analysis in *Hines*, when a grievance has been submitted to a final and binding decision, the focus of a subsequent § 301 unfair representation suit is "whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings." 424 U.S. at 568. This analytical focus is the same notwithstanding the hearing body's composition. Therefore, it makes little sense to urge, as TDU does, that different limitations periods should apply depending on whether the final decision is made by a tripartite, bipartisan or nonpartisan hearing body.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2386

PHILIP DELCOSTELLO,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Local 557, International Brotherhood of Teamsters and Anchor Motor Freight, Inc., Respondents, hereby object to the Motion of Teamsters for a Democratic Union (hereinafter TDU) for Leave to File a Brief as Amicus Curiae in Support of Petitioner. The reasons why consent to file such brief should be withheld are as follows:

1. The arguments presented by TDU in the Amicus Curiae brief are as follows:

   a. A teamster joint committee "award" is not the equivalent of an impartial arbitral decision and should not be governed by a statute of limitation for vacating arbitral decisions.

b. Extension of *Mitchell* to suits by workers against their unions for breach of the duty of fair representation will undermine the "bulwark" against improper union conduct.

2. The issues which TDU seeks to discuss in the proposed brief amicus curiae are questions collateral to the issues actually involved in this proceeding.

In Paragraph 2 of its Motion for Leave to File a Brief as Amicus Curiae in Support of Petitioner, TDU states that it will present an analysis of the differences between the joint committee and arbitral models. Yet, TDU admits that Petitioner DelCostello does not address this issue but proceeds on the assumption that joint committees are legally equivalent to arbitrators. Through this statement, TDU concedes that its brief would place before the Court an argument not raised by the parties below.

The second issue which TDU seeks to raise concerns application of *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981) to labor organizations. Although Petitioner DelCostello presented this question to the Court in his Petition for Certiorari, it is not addressed in his Brief to the Court. Thus, the argument made by TDU against application of *Mitchell* to unions represents an issue not otherwise before the Court.

3. For the parties to be put in the position of having to respond to the arguments of TDU on those collateral issues would unnecessarily cause the briefs to be enlarged and would be likely to distract both counsel and the Court from the issues actually involved.

3. Furthermore, the interest of TDU is no more than a remote interest in the issues actually involved in this litigation. The Motion of TDU fails to disclose any relationship between it and the specific collective bargaining agreement at issue herein. Nor does TDU allege any

impact of this case upon litigation to which it is a party. The interest of TDU is purely academic, and without displayed bearing upon this proceeding.

For each and all of the foregoing reasons, the Teamsters for a Democratic Union's Motion for Leave to File a Brief of Amicus Curiae in Support of Petitioner should be denied.

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Dated: January 21, 1983

No. 81-2386-CFX
Status: GRANTED

Title: Philip Del Costello, Petitioner
v.
International Brotherhood of Teamsters, et al.

Docketed:
June 29, 1982

Court: United States Court of Appeals
for the Fourth Circuit

Vide:
81-2408

Counsel for petitioner: Zinman, William H.

Counsel for respondent: Yaller, Carl S., Goldfarb, Bernard S.

Entry	Date	Note	Proceedings and Orders
1	Jun 29 1982	G	Petition for writ of certiorari filed.
3	Jul 12 1982		Order extending time to file response to petition until August 14, 1982.
4	Aug 4 1982		DISTRIBUTED. September 27, 1982
5	Aug 12 1982	X	Brief of respondent Anchor Motor Freight, Inc. in opposition filed.
6	Aug 13 1982	X	Brief of respondent Local 557, Intl. in opposition filed.
7	Aug 13 1982		Brief amicus curiae of AFL-CIO filed.
8	Aug 19 1982	X	Reply brief of petitioner Philip Del Costello filed.
9	Sep 10 1982	N	Motion of petitioner to consolidate with No. 81-2408, United Steelworkers of America, etc., et al. v. Donald C. Flowers, et al. filed.
10	Sep 17 1982		Brief of Respondent Anchor Motor Freight in opposition to petitioners motion for consolidation filed.
12	Oct 27 1982		DISTRIBUTED. November 12, 1982
14	Nov 19 1982		REDISTRIBUTED. November 24, 1982
15	Nov 29 1982		Petition GRANTED. The case is consolicated with 81-2408 and a total of one hour is allotted for oral argument. **********
16	Jan 13 1983	G	Motion of Teamsters For A Democratic Union for leave to file a brief as amicus curiae in No. 81-2386 filed.
17	Jan 20 1983		Brief amicus curiae of Chamber of Commerce of U.S. filed. VIDED.
18	Jan 24 1983		Opposition of Respondents to motion of Teamsters For A Democratic Union for leave to file a brief as amicus curiae filed.
19	Jan 25 1983	G	Motion of petitioners for divided argument filed.
20	Jan 11 1983		Brief of petitioner Philip Del Costello filed.
21	Jan 11 1983		Joint appendix filed.
22	Feb 3 1983	D	Motion of respondents in No. 81-2408 for divided argument and for additional time for oral argument filed.
23	Feb 4 1983	D	Motion of respondents in No. 81-2386 for divided argument filed.
24	Feb 14 1983		Brief of respondent Local 557, Intl. filed.
25	Feb 14 1983		Brief of respondent Anchor Motor Freight, Inc. filed.
26	Feb 10 1983		Brief amicus curiae of Intl. Brotherhood of Teamsters, etc. filed.
27	Feb 16 1983		Response of petitioners to motions of respondents for divided argument filed.
28	Feb 17 1983		Record filed.
29	Feb 17 1983		Certified original record & C.A. proceedings, (Box)

No. 81-2386-CFX

Entry	Date	Note	Proceedings and Orders
			received.
31	Feb 22 1983		Motion of petitioners for divided argument GRANTED. And divided argument on behalf of respondents is granted.
32	Feb 22 1983		Motion of respondents in No. 81-2408 for divided argument and for additional time for oral argument DENIED.
33	Feb 22 1983		Motion of respondents in No. 81-2386 for divided argument DENIED.
34	Feb 22 1983		Motion of Teamsters For A Democratic Union for leave to file a brief as amicus curiae in No. 81-2386 GRANTED.
35	Mar 3 1983	D	Motion of respondent Anchor Motor Freight, Inc. for special permission to divide oral argument filed.
37	Mar 21 1983		Motion of respondent Anchor Motor Freight, Inc. for special permission to divide oral argument DENIED.
38	Mar 24 1983		SET FOR ARGUMENT. Monday, April 25, 1983. (4th case) The case is consolidated with No. 81-2408. (1 hour)
39	Apr 1 1983		CIRCULATED.
40	Apr 9 1983	X	Reply brief of petitioner Philip Del Costello filed.
41	Apr 25 1983		ARGUED.